PAPER-13: Corporate Laws and Compliance

Question 1:

(a) "Super Cop" Company has 11 Directors on the Board consisting of the following:

- **(i) Mr. Active, Mr. Achieve as Nominees from two Public Financial Institutions.**
- **(ii) Mr. First, Mr. Second, Mr. Third appointed at the 2nd AGM.**
- **(iii) Mr. Fourth, Mr. Fifth appointed at the 3rd AGM.**
- **(iv) Mr. Addition was appointed as Additional Director subsequent to 3rd AGM.**
- **(v) Mr. Casual was appointed as Director in place of Mr. Soul who died and was earlier appointed during the 3rd AGM.**
- **(vi) Mr. Excellent was appointed as Managing Director for 5 years w.e.f. 2nd AGM.**
- **(vii) Mr. One More was appointed as Additional Director soon after Mr. Addition was appointed as Additional Director.**

List out in order, who shall be vacating the office at the 4th AGM of the Company.

Answer:

Calculation of list of retiring directors of "Super Cop" Company Limited.

Composition of Board of Directors:

Total Number of Directors holding Office		11
Less:	Nominee Directors of Public Financial Institutions	2
	Additional Directors	2
	MD appointed for specified period of office [Non-Rotational Director]	1
Hence, Number of Rotational Directors		6
Therefore, Number of Retiring Directors (1/3 of the above)		2

Analysis:

(a) Additional Directors shall hold office upto the date of the next AGM.

(b) Director appointed against Casual Vacancy (Mr.Casual) shall hold office only upto the date to which the Director in whose place he is appointed would have held office.

(c) Out of the Rotational Directors, Mr. First, Mr. Second, Mr. Third have been holding office for the longest period. Any 2 of them are liable to retire at the next AGM. Where Directors have been appointed on the same day, in the absence of agreement between the Directors, the Retiring Directors shall be determined by draw of lots.

Conclusion:

Directors who are liable to retire at 4th AGM are

(a) Additional Director (i.e. Mr. Addition, Mr. One More) since they automatically vacate

their office, and

(b) Any 2 among Mr. First, Mr. Second and Mr. Third.

(b) M/s Super Flexi Consultants Private Limited seeks your legal advice regarding the following appointments relating to directors and their relatives:

(i) Miss Niece, a relative of a director, is to be appointed as Chief Public Relations Officer on a salary of ₹ 65,000 per month.

(ii) Mr. Well connected, a relative of a director, is to be appointed as Chief Executive Officer on a consolidated salary of ₹ 2,55,000 per month.

(iii) Mr. Nephew, who is a relative of one of the directors, is to be appointed as the managing director on a monthly salary of ₹ 2,80,000 plus other perquisites as applicable to other executives of the company.

Advise explaining the relevant provisions of the Companies Act, 2013.

Answer :

Appointment of any related party to an office or place of profit in the company, its subsidiary company or associate company attracts section 188 of the Companies Act, 2013.

Legal requirements under section 188

Section 188 requires compliance with the following legal requirements:

(i) Consent of the Board is to be obtained by passing a resolution at a Board Meeting.

(ii) The agenda of the Board meeting in which the approval of the Board is to be obtained shall contain the particulars prescribed under sub-rule (1) of Rule 15 of the Companies (Meetings of Board and its Powers) Rules, 2014.

(iii) If any director is interested in such appointment, he shall not be present at the Board meeting during discussions on such appointment.

(iv) The appointment shall require the prior approval of the members by a special resolution if the monthly remuneration exceeds ₹ 2,50,000.

(v) The explanatory statement annexed to the notice of the general meeting in which the special resolution is to be passed, shall contain the prescribed particulars.

(vi) If a member is a related party, he shall not vote on such special resolution.

(vii) The term 'office or place of profit' is defined under Explanation to sub-section (1) of section 188, as follows:

(a) An office or place held by a director is an office or place of profit if the director holding it receives from the company anything by way of remuneration over and above the remuneration to which he is entitled as director.

(b) An office or place held by a person other than a director is an office or place of profit if such person receives from the company anything by way of remuneration.

Hence, the answer to the given problem is given as under:

(i) Miss Niece is a relative of a director. As per Clause (76) of section (2), a relative of a director is a related party. Thus, appointment of Miss Niece as Chief Public Relations

Officer at a monthly remuneration of ₹ 65,000 amounts to appointment of a related party to an office or place of profit in the company, attracting the provisions of section 188.
However, such appointment does not require the prior approval of the members by passing a special resolution since the monthly remuneration does not exceed ₹ 2,50,000.
Thus, the appointment of Miss Niece as Chief Public Relations Officer at a monthly remuneration of ₹ 65,000 requires compliance with legal requirements as stated earlier in Points (i) to (iii).

(ii) Mr. Wellconnected is a relative of a director. As per Clause (76) of section (2), a relative of a director is a related party. Thus, appointment of Mr. Wellconnected as Chief Executive Officer at a monthly remuneration of ₹ 2,55,000 amounts to appointment of a related party to an office or place of profit in the company, attracting the provisions of section 188.
Such appointment also requires the prior approval of the members by passing a special resolution since the monthly remuneration exceeds ₹ 2,50,000.
Thus, the appointment of Mr. Well connected as Chief Executive Officer at a monthly remuneration of ₹ 2,55,000 requires compliance with legal requirements as stated earlier in Points (i) to (vi).

(iii) Mr. Nephew is a relative of a director. As per Clause (76) of section (2), a relative of a director is a related party. He is proposed to be appointed as a managing director of the company at a monthly remuneration of ₹ 2,80,000. Since, a managing director does not draw anything more than the remuneration to which he is entitled as a director, the office of managing director cannot be said to be an office, or place of profit. Thus, the appointment of Mr. Nephew as a managing director does not attract the provisions of section 188, and so compliance with any of the legal requirements specified under section 188 is not required.

(c) Are the provisions of CARO, 2015 applicable to all companies?

Answer:

CARO, 2015 shall apply to every company including a foreign company as defined in clause (42) of section 2 of the Companies Act, 2013, Except –

(i) a banking company as defined in clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949);
(ii) an insurance company as defined under the Insurance Act,1938 (4 of 1938);
(iii) a company licensed to operate under section 8 of the Companies Act;
(iv) a One Person Company as defined under clause (62) of section 2 of the Companies Act
(v) small company as defined under clause (85) of section 2 of the Companies Act; and
(vi) a select class of private companies, as stated below.

CARO is not applicable to private limited companies which fulfill all the following conditions throughout the reporting period covered by the audit report:

A private limited company with -

(i) a paid up capital and reserves not more than rupees fifty lakh
(ii) which does not have loan outstanding exceeding rupees twenty five lakh from any bank or financial institution
(iii) does not have a turnover exceeding rupees five crore at any point of time during the financial year.

A private limited company, in order to be exempt from the applicability of CARO, must satisfy all the conditions mentioned above cumulatively. In other words, even if one of the conditions is not satisfied, a private limited company's auditor has to report on the matters specified in the Order.

Question 2.

(a) The Board of Directors of Nice Mills Limited propose to transfer more than 10% of the profits of the company to the reserves for the current year. Advise the Board of Directors of the said company explaining the relevant provisions of the Companies Act and the rules thereunder.

Answer:

Sources of dividend

The fundamental rule is that dividend is to be declared or paid only out of profits. In other words, the dividend for any financial year can be declared or paid only out of the following sources:

(i) Profits of the company for that financial year (after providing for depreciation)
(ii) Profits of the company for any previous financial year(s) and remaining undistributed (after providing for depreciation)
(iii) Moneys provided by the Central Government or State Government in pursuance of a guarantee given by it.

Provision for Depreciation

Depreciation shall be provided in accordance with the provisions of Schedule II.

Transfer to reserves

A company may, before the declaration of any dividend in any financial year, transfer such percentage of its profits for that financial year as it may consider appropriate to the reserves of the company.

Declaration of dividend out of reserves

(i) Where, owing to inadequacy or absence of profits in any financial year, any company

proposes to declare dividend out of the accumulated profits earned by it in previous years and transferred by the company to the reserves, such declaration of dividend shall not be made except in accordance with such Rules as may be prescribed in this behalf.

(ii) No dividend shall be declared or paid by a company from its reserves other than free reserves.

Prohibition on declaration of dividend

(i) A company shall not declare any dividend on its equity shares, if it has failed to comply with the provisions of-
   I. Section 73 (Prohibition on acceptance of deposits from public); and
   II. Section 74 (Repayment of deposits, etc. accepted before commencement of this Act).

(ii) The prohibition on declaration of dividend on equity shares shall continue so long as the failure to comply with sections 73 and 74 continue.

Payment of dividend to whom:

The dividend shall be paid to -

(i) the registered shareholder of shares; or
(ii) the order of the registered shareholder; or
(iii) the bankers of the registered shareholder.

Mode of payment

No dividend shall be payable except in cash, i.e. dividend shall be payable only in cash. However, payment of dividend by issue of a cheque or dividend warrant or payment of dividend in electronic mode is also permissible.

However, issue of bonus shares or payment of a bonus call by capitalising the profits or reserves is permissible. In other words, where a company, instead of declaring dividend, issues bonus shares or makes a bonus call, it shall not be deemed to be a contravention of section 123. But, the issue of bonus shares in lieu of dividend declared is not permissible.

(b) M/s Suraksha Limited owns a Multi-speciality Hospital in Chennai. Dr. Hasan, a practising Heart Surgeon, has been appointed by the company as its non-executive ordinary director and it wants to pay him fee, on case to case basis, for surgery performed on the patients at the hospital. A question has arisen whether payment of such fee to him would amount to payment of managerial remuneration to a director subject to any restriction under the Companies Act, 2013.

Advise the company, which seeks to ensure that the same does not contravene any provision of the Companies Act, 2013.

Answer:

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

of section 197(1).

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

(i) the services rendered are of a professional nature; and

(ii) in the opinion of the Nomination and Remuneration Committee (if the company is required to constitute Nomination and Remuneration Committee under section 178) or the Board of directors (in any other case), the director concerned possesses requisite professional qualifications.

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

(c) A group of shareholders of Duplicate Ltd. filed an application before the Company Law Board alleging various acts of fraud and mismanagement by Mr. Umesh, the managing director, and his associates. During the course of hearings before the Company Law Board, it was contended on behalf of the company that the alleged transactions had taken place long ago and that the managing director, who was responsible for such actions had already been removed and that there is no case before the Company Law Board to interfere in the working of the company. The contention of the applicants on the other hand is that though the fraudulent nature of the transactions is a thing of the past and though the managing director had been removed, yet, the management of the company is still controlled by the henchmen of Mr. Umesh. Discuss the powers of the Company Law Board in support of your answer.

Answer:

Sections 397 and 398 may be invoked only when the acts constituting oppression or mismanagement are continuous. Further, the acts constituting oppression or mismanagement must continue till the date of making the application.

There are only two cases in which, on the application made under section 397 or 398 of the Companies Act, 1956 the Company Law Board is empowered to give relief in respect of past and concluded transactions which are no longer continuing wrongs; they are really in the nature of exceptions to the general principles as stated above. Firstly, section 402(f) enables the Company Law Board to set at naught transactions amounting to fraudulent preference, effected within 3 months before the date of the application under section 397 or 398 even though they are no longer continuing wrongs. Secondly, section 406 of the Companies Act, 1956, read with section 543 of the Act set forth in Schedule XI enables Company Law Board to book delinquent directors, manager and other office bearers of the company and to enforce the company's claim against them if they have misapplied or retained company's money or have committed any misfeasance or breach of trust in relation to the company [Sheth

Mohanlal Ganpatram v Shri Satyaji Jubilee Cotton and Jute Mills Co. Ltd. and others (1964) 34 Comp Cas 777].

In the instant case, the contentions of the applicants that the management of the company is still controlled by the managing director is not sufficient as it is necessary for them to establish that the matter complained of falls under either of the above two exceptions.

Question 3.

(a) State, with reasons, whether the following are debts for the purpose of section 433(e) of the Companies Act, 1956:

(i) Contingent or conditional liability.

(ii) Non-payment of dividend declared.

(iii) Non-payment of salary to an employee.

(iv) Non-payment to a creditor of a disputed liability.

Answer:

The Court may order the winding up of a company under any of the circumstances mentioned under section 433(a) to (f). Section 433(e) provides that a company may be wound up by the Court if it is unable to pay its debts. Section 434 specifies the circumstances in which the company shall be deemed to be unable to pay its debts.

(i) Contingent or conditional liability

A debt must be a definite sum of money payable immediately or at a future date. A contingent or conditional liability is not a debt, unless the contingency or condition has already happened [Registrar of Companies v Kavita Benefit Private Limited(1978) 48 Comp Cas 231].

(ii) Non-payment of dividend declared

On declaration, the dividend becomes a debt payable by the company. Non-payment of dividend entitles the shareholder to apply for winding up of the company [Hariprasad (C) v Amalgamated Commercial Traders (Private) Ltd. (1964) 34 Comp Cas 209]. Therefore, non-payment of dividend declared would amount to a debt for the purpose of winding up petition.

(iii) Non-payment of salary to an employee

Non-payment of salary to an employee of the company is not a debt for the purpose of section 433(e) [Pawan Kumar Khullar v Kaushal Leather Board Ltd. AIR 1966 MP 85]. However, a contrary decision has been given by the A.P. High Court in which the Court construed the word 'debt as a sum which is to be recovered from a person who is obliged to make the payment and accordingly the Court held that unpaid salary is a debt [B.5. Damagry v VIF Airways Ltd.]. It seems that A.P. High Court judgement is realistic and reflects the intention of the legislature.

(iv) Non-payment to a creditor of a disputed liability

Where a debt is bona fide disputed by the company and the Court is satisfied with the company's defence, a winding up order will not be made [Piara Singh (S) v S.H.R. Properties Pvt. Ltd. (1993) 10 CLA 83]. If a debt is bona fide disputed there cannot be a neglect to pay. The Court shall consider the following principles:

(a) Whether the defence of the company is in good faith and is of some substance.
(b) Whether the defence is likely to succeed in point of law.
(c) Whether the company has produced prima facie proof of the facts on which the defence depends [Kirpal Singh v Sutlej Land Finance Pvt. Ltd. (1989) 66 Comp Cas 841].

(b) M/s Neha Ltd. was incorporated on 1st January, 2012. On 1st November, 2014 a political party approaches the company for a contribution of ₹ 10 lakhs for political purpose. Advise in respect of the following:

(i) Is the company legally authorised to give this political contribution?
(ii) Will it make any difference, if the company was in existence on 1st October, 2011?
(iii) Can the company be penalised for defiance of rules in this regard?

Answer:

As per section 182 of the Companies Act, 2013, the following companies shall not make a political contribution:

(a) A Government company.
(b) A company which has been in existence for less than 3 financial years.

In the given case -

(i) M/s Neha Ltd. cannot make any political contribution because the company is not in existence for a period of 3 financial years.
(ii) If Neha Ltd. were incorporated on 1.10.2011, it may make a political contribution as on 1.11.2014 because in such a case, it would have been in existence for 3 financial years. However, it shall comply with the following conditions:
    (a) The amount of political contribution shall not exceed 7.5% of average net profits during immediately preceding 3 financial years.
    (b) The Board shall make a political contribution only by passing a resolution at a Board meeting.
    (c) The company shall disclose in its profit and loss account the amount of political contribution and the name of the political party to which such amount has been contributed.
(iii) If a company makes a political contribution in contravention of section 182 of the Companies Act, 2013, following consequences shall follow:
    (a) The company shall be punishable with fine which may extend to 5 times the amount so contributed.
    (b) Every officer of the company who is in default shall be punishable with imprisonment upto 6 months and shall also be liable to fine which may extend to

5 times the amount so contributed.

(c) Discuss, the power of Central Government to direct companies to furnish information of statistics, in line with section 405 of Companies Act, 2013.

Answer:

The power of the Central Government to direct companies to furnish information or statistics is contained in section 405, as explained below:

(i) The Central Government may, by order, direct any company or any class of company or companies generally to furnish such information or statistics with regards to its / their constitution or working within such time, as may be specified in the order.

(ii) The order of the Central Government shall be published in the official gazette.

(iii) The date of publication of order in the official gazette shall be deemed to be the date of order.

(iv) The order may be addressed to companies generally or to any class of companies, in such manner, as the Central Government may think fit.

(v) The Central Government may, by order, require such company or companies to produce such records or documents or allow inspection thereof by such officer or furnish such further information as the Central Government may consider necessary.

(vi) A person shall be liable for punishment for contravention of the provisions of section 405 of the Companies Act, 2013 if –
  (a) He fails to furnish information required as per the order of Central Government; or
  (b) He knowingly furnishes any incorrect or incomplete information in any material aspect.

(vii) Punishment for contravention is –
  (a) The company shall be liable to fine upto ₹ 25,000
  (b) Every officer who is in default shall be liable to –
    1. Imprisonment upto 6 months; or
    2. A minimum fine of ₹ 25,000 but which may extend upto ₹ 3,00,000
    3. Or both.

Where a foreign company carries on business in India, all references to a company in this section shall be deemed to include references to the foreign company in relation, and only in relation to such business.

Question 4.

(a) Comment on the following:

(i) Mr. Love, a Chartered Accountant in full-time practice, was acting as the Statutory Auditor of a Public Limited Company, till it was wound up. Love was appointed as the Liquidator for purposes of winding up proceedings.

(ii) White Star Ltd was incorporated on 1st August. Ms. Amba, who is related to the Chairman of the Company, is appointed as Auditor of the Company by the Board of Directors at its first meeting held on 4th September. Is the appointment valid?

Answer:

(i)

1. **Provision:**
   (a) A CA in practice can act as a Liquidator of a Company, subject to ICAI's Regulations. However, a CA cannot act both as Liquidator and Auditor of the Company at the same time.
   (b) When a CA acts as a Liquidator, the Statement of Accounts to be filed u/s 348(1) should be audited by a qualified Chartered Accountant other than the Chartered Accountant who is the Liquidator of the Company.

2. **Analysis and Conclusion**: The appointment of Mr. Love, Chartered Accountant, to carry out both the functions as a Liquidator and as an Auditor will not be proper, having regard to the concept of Auditor's independence. Thus, Mr. Love, cannot act as both the Liquidator and the Auditor.

(ii)

1. **Qualification:** u/s 141(3)(f) a Person whose Relative is a Director or is in the employment of the Company as a Director or Key Managerial Personnel, is not eligible for appointment as Auditor. Hence, Amba who is related to the Chairman is primarily not qualified for appointment.

2. **Time Limit:** The BOD can appoint the First Auditor(s) (qualified/eligible persons), within 30 days from the date of incorporation of the Company. In this case, the First Auditor(s) should have been appointed within 30 days, i.e. within 31st August.

3. **Conclusion:** Hence, the appointment of Ms. Amba by the BOD on 4th September is invalid. In this case, the Company in General Meeting is empowered to make the appointment. Members shall appoint the Auditor within 90 days in an AGM.

(b) Great Ltd., a company registered under Indian law owns a factory in Kolkata, wherein it manufactures jute products. By a notification of the State Government, issued during October, 1996 due to a strike and lockout it was declared a relief undertaking. After four months, in February, 1997 the lockout was lifted. However, during the said period the

company's directors defaulted in payment of provident fund (PF) and other ancillary dues. During the month of December, 1997, the Regional PF Commissioner initiated criminal proceedings against the company and its directors under the Employees PF and Miscellaneous Provisions Act, 1952, for default and delay in payment of PF dues.

Immediately the directors of the company applied to the High Court for relief under the Companies Act, praying for relief from liability under the PF law. The petition is now pending before a single judge. The company and its directors desire to know from you, as to the tenability of their claim for relief at the High Court, and as to whether they would be excused and exonerated by the High Court, in respect of the contraventions committed under the PF Law.

Briefly discuss the law on the subject and state whether the petition filed by the directors would be admitted under the Companies Act.

Answer:

The Court may, in its discretion, relieve an officer of the company from liability, if it appears to the Court that –

(i) he is or may be liable for negligence, default, breach of duty, misfeasance or breach of trust;
(ii) he has acted honestly and reasonably; and
(iii) having regard to all the circumstances of the case, he ought fairly to be excused.

In the present case, the following two questions need to be answered:

1. Whether relief under section 463 of the Companies Act, 2013 is available to the company?
   Under section 463, the Court has the power to grant relief only to a director or officer of a company, and not to the company. Therefore, Great Limited cannot claim any relief from the High Court under section 463.

2. Whether relief under section 633 is available for contraventions made under the PF Act?
   Relief under section 633 of the Companies Act, 1956 (corresponding to section 463 of the Companies Act, 2013) cannot be extended in respect of any liability under any Act, other than the Companies Act [Rabindra Chamaria v ROC(1992) 73 Comp Cas 257]. In the present case, the proceedings against the company and the directors have been initiated as a result of certain acts and omissions committed under the Employees PF and Miscellaneous provisions Act, 1952. There has been no default, refusal, contravention, non-compliance or failure under the Companies Act. Therefore, the Court cannot grant any relief to the directors.

(c) The managing director of M/s. Worse Builders Ltd. has resigned, as the company was not doing well and also incurring losses. The Board of directors have decided to appoint Mr. Good aged 71 years as the new managing director, because of his proven track record of nearly 50 years, turning sick companies into profitable ones. The only condition put forth by Mr. Good is that he should be paid the maximum permissible salary and perquisites as provided in the Companies Act, 2013 without requiring the approval of Central Government. The effective capital of the company is ₹ 20 crores. Advise the company about:

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

(ii) The quantum of remuneration payable to him.

Answer.

(i) The procedure to be followed for the appointment of Mr. Good:

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

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

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

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

Also, section 196 provides that a person who has attained the age of 70 years may be appointed as managing director, whole-time director or manager, if -

(a) such appointment is made by passing a special resolution; and

(b) the explanatory statement annexed to the notice shall indicate the justification for appointing such person.

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

In the given case, Mr. Good has completed the age of 70 years. Thus, the conditions required to be fulfilled by Mr. Good are described as under:

- If Mr. Good fulfills all the conditions contained in Part I of Schedule V and also a special resolution is passed in the general meeting approving his appointment, no approval of the Central Government is required and therefore Mr. Good may be appointed as a managing director for five years. The company shall file a return with the registrar in Form No. MR. 1 within 60 days of such appointment.
- If Mr. Good does not fulfill any of the conditions contained in Part I of Schedule V, he may be appointed as a managing director only with the approval of Central Government. However, a special resolution shall be required in this case also, since his age is more than 70 years.

(ii) The quantum of Remuneration to be payable to Mr. Good:

Where a company does not make any profits or its profits are inadequate, it may pay remuneration to its managing director in accordance with Section II of Part II of Schedule V

without any approval of the Central Government.

In the present case, the effective capital of the company is ₹ 20 crores. As per Section II of Part II of Schedule V, a company having effective capital between ₹ 5 crores and ₹ 100 crores may pay to its managerial person maximum remuneration of ₹ 42 lakh per year. Thus, a maximum of ₹ 42 lakh per year can be paid to Mr. Good as assured remuneration. However, the company may pay to him ₹ 84 lakh per year instead of ₹ 42 lakh per year, if a special resolution is passed in this respect.

Mr. Good is also eligible to the following perquisites which shall not be included in the computation of ceiling on remuneration:

(i) Contribution to provident fund, superannuation fund, or annuity fund to the extent not taxable under Income-tax Act.
(ii) Gratuity payable at a rate not exceeding half month's salary for each completed year of service.
(iii) Encashment of leave at the end of the tenure.

Question 5.

(a) Mr. Useful an expert in modern agriculture practices is willing to lend his services as a director of M/s Lord Krishna Cotton Producer Company Ltd. registered under Section 581C of the Companies Act, 1956. Advise Mr. Useful as to how he can be appointed as a director including (1) The total number of directors that can be appointed (2) The tenure of the Directors (3) The time limit within which the appointment should be made (4) the co-option of directors and (5) the voting powers of such co-opted directors.

Answer:

The given problem relates to sections 581O and 581P of the Companies Act, 1956, as discussed below.

(i) Total number of directors that can be appointed in a producer company is 15. However, if a Producer Company is formed by way of conversion of a society into a Producer Company, all the directors of the erstwhile society as on the transformation date shall continue in office for a period of 1 year from the transformation date (Section 581O).
(ii) Tenure of directors is minimum 1 year and maximum 5 years (Section 581P).
(iii) As per section 581P, the time limit for appointment of directors is 90 days from the date of registration of the Producer Company. However, the election of directors shall be conducted within 1 year, if -
    I. the Producer Company is formed by conversion of a society into a Producer Company; and
    II. at least 5 directors held office as on the date of conversion of society into Producer Company.
(iv) The co-option of directors is possible. The Board may co-opt one or more expert

directors or additional directors. These directors shall not exceed 1/5th of the total number of directors (Section 581P).

(v) The expert directors shall not have the right to vote in the election of the chairman but shall be eligible to be elected as chairman, if so provided by its articles (Section 581P).

(b) Sundar who was appointed as a Director at the last AGM resigned. The Board filled up the vacancy by appointing Sashi. But within few days of his becoming Director, Sashi died. The Board wishes to appoint Shyam in place of Sashi in the next Board Meeting. Can the Board do so?

Answer:

Casual Vacancy u/s 161(4) is a vacancy arising in the office of the Director appointed by the Company in General Meeting before the expiry of his term of office.

Here, the vacancy on account of death of Sashi cannot be considered as a casual vacancy in the office of the Director, as the appointment of Sashi himself was not originally made by the Company in General Meeting.

However, for interest of the smooth working of a Company, if the casual vacancy is in an office which was filled by election at a General Meeting, then the Board may fill the casual vacancy as many times as necessary, i.e. if the original appointment was made by the Company in the General Meeting any subsequent casual vacancy to the office of the Director can be filled by the Board. [Company News & Notes 01.07.1963 Issue]

Hence, in the above case, the Board can appoint Shyam as Director.

(c) The paid-up Share Capital of Avik Private Limited is ₹ 1 crore, consisting of 8 lacs Equity Shares of ₹ 10 each, fully paid-up and 2 lacs Cumulative Preference Shares of ₹ 10 each, fully paid-up. Avni Private Limited and Bina Private Limited are holding 3 lacs Equity Shares and 1,50,000 Equity Shares respectively in Avik Private Limited.

Avni Private Limited and Bina Private Limited are the subsidiaries of Tara Private Limited. With reference to the provisions of the Companies Act, 2013 examine whether Avik Private Limited is a subsidiary of Tara Private Limited? Would your answer be different if Tara Private Limited has 8 out of total 10 directors on the Board of Directors of Avik Private Limited?

Answer :

Total ESC of Avik Pvt. Ltd.	-	is ₹ 80,00,000.
ESC held by Avni Pvt. Ltd. in Avik Pvt. Ltd.	-	is ₹ 30,00,000.

ESC held by Bina Pvt. Ltd. in Avik Pvt. Ltd.	- is ₹ 15,00,000.
ESC held by Tara Pvt. Ltd. in Avik Pvt. Ltd.	- is ₹ 45,00,000, since for the purpose of determining holding-subsidiary relationship, ESC held in Avik Ltd. by its Subsidiaries Avni Pvt. Ltd. (viz. ₹ 30,00,000) and Bina Pvt. Ltd. (viz. ₹
Avik Pvt. Ltd. is a subsidiary of Tara Pvt. Ltd.	- since Tara Pvt. Ltd. holds more than one-half of ESC of Avik Pvt. Ltd.
Answer would remain same	- even if Tara Pvt. Ltd. has 8 out of 10 directors on the Board of Directors of Avik Pvt. Ltd. since in such a case Tara Pvt. Ltd. controls the composition of Board of Directors of Avik Pvt. Ltd.

Question 6.

(a) Xavier, a registered shareholder of Y limited left his share certificates with his broker A. A forged the transfer deed in favour of Zeus. Accompanied by these share certificates Zeus lodged the transfer deed along with the share certificates with the company for registration. The Company Secretary who had certain doubts, wrote to Xavier informing him of the proposed transfer and in the absence of a reply from him (Xavier) within the stipulated time, registered the transfer of shares in the name of Zeus. Subsequently, Zeus sold the shares to Jones and Jones's name was placed in the register of shareholders. Later on, Xavier discovered that forgery has taken place.

Referring to the provisions of the Companies Act, state the remedy available to Xavier and Zeus in the given case. Explain.

Answer:

Rights of Mr. Xavier

He can compel the company to restore his name on the register of members (since a forged transfer is without any legal effect and the true owner continues to be the member of the company).

Liabilities of Zeus

Zeus' is liable to compensate the loss caused to the company since he had lodged the forged transfer deed, even though he was not aware of the forgery.

Rights of Jones

The company can refuse to register 'Jones' as a member.

The company is liable to 'Jones' since the company had issued share certificate to Zeus, and therefore, the company shall be stopped from denying the liability accruing to it from its own default.

(b) Explain the Provisions of Companies Act, 1956 relating to the establishment of Investor Education and Protection Fund.

Answer:

Treatment of dividend declared but remaining unpaid

(i) Transferred to unpaid dividend account - Dividend remaining unpaid or unclaimed for 30 days from the date of its declaration shall be transferred within 7 days to a special account in any scheduled bank to be called 'Unpaid Dividend Account of ... Company Limited/Company (Private) Limited'.

(ii) Interest for delayed transfer- Interest at the rate of 12% per annum is payable by the company for delay in making the above transfer.

Treatment of dividend remaining unpaid in 'unpaid dividend account'

(i) Transfer to 'Investor Education and Protection Fund' - Any money transferred to the unpaid dividend account of a company which remains unpaid for 7 years from the date of such transfer shall be transferred by the company to the 'Investor Education and Protection Fund' (hereinafter called as 'Fund').

(ii) Discharge of company - On transfer of unpaid dividend to the Fund, the company shall be discharged of all its liabilities in respect of unpaid dividend.

(iii) No payment after 7years - No person shall be entitled to claim any money transferred to the Fund, i.e., if unpaid dividend is not claimed by the shareholder within 7 years, he shall loose all his rights to recover it.

Meaning and provisions applicable to Investor Education and Protection Fund'

The Investor Education and Protection Fund shall be established by the Central Government.

(a) Credits to the Fund - Following sums shall be credited to the Fund:

- Following sums remaining unpaid for 7 years from the due date:
  - (i) Amount in the unpaid dividend account
  - (ii) Application moneys received and due for refund
  - (iii) Deposits matured but remaining unpaid
  - (iv) Debentures matured but remaining unpaid
- Interest accrued on the amounts referred to in clauses (i) to (iv)
- Grants and donations by the Central Government or State Government, or any other institutions
- Interest or other income received out of the investments.

(b) Furnishing of details - When making a transfer to the Fund, the company shall furnish following details to the authority appointed by the Central Government:

- All sums included in such transfer
- Nature of the sums
- Names and last known addresses of the persons entitled to receive the sum

- The amount to which each person is entitled
- Such other particulars as may be prescribed.

(c) Receipt to be furnished to the company - On transfer of any money to the Fund, the authority managing such Fund shall issue a receipt to the company acknowledging the transfer of money in the Fund. Such receipt shall be an effectual discharge of the company in respect of money transferred to the Fund.

(d) Utilisation of Fund - The amount accumulated in the Fund shall be used for the purpose of-
- promotion of awareness among the investors; and
- protection of the interests of investors.

(e) Administration of Fund - The authority appointed by the Central Government shall administer the Fund and shall be competent to spend moneys for carrying out the objects.

Payment of moneys transferred to the Fund

(a) No person shall be entitled to any money transferred to the Fund.
(b) No claim shall lie against the company in respect of amounts transferred to the Fund.

When any amount is transferred by the company to the Fund, the liability of the company comes to an end.

(c) The Board of Directors of XYZ Private Limited, a subsidiary of SRN Limited, decides to grant a loan of ₹ 2.00 lac to P, the Finance manager of the company getting salary of ₹ 30,000 per month, to buy 400 partly paid-up equity shares of ₹ 1,000 each of XYZ Limited. Examine the validity of Board's decisions with reference to the provisions of the Companies Act.

Answer:

The Board's decision is not valid since the loan of ₹ 2 lakh given to the Finance Manager exceeds 6 months' salary of the Finance Manager and the loan is given for purchase of partly paid shares,

Question 7.

(a) The Branch Accounts were audited by another Firm of CA's and, therefore, the Statutory Auditors could rely on the same and only check the consolidation. Comment.

Answer:

The Company's Auditor is required to deal with the Branch Audit Report received from the Branch Auditor, in preparing his report. The Company's Auditor shall state in his report whether

the Branch Audit Report has been forwarded to him and how he has dealt with the same.

The manner in which to deal with the Branch Audit Report is left to the best judgement of the Statutory Auditor, to decide the prima facie relevance and impact of the Branch Audit Report on the Company Accounts.

Standards on Auditing:

(i) The Company Auditor is normally entitled to rely upon the work of the Branch Auditor unless there are special circumstances to make it essential for him to visit the Branch, or to examine the books of account and other records of the said Branch.

(ii) The Company Auditor is not required to evaluate the professional competence or independence of the Branch Auditor, except in situations, which create doubt about the professional competence or independence of the other Auditor.

The Company Auditor will have to decide, irrespective of the Management's request to check consolidation only, as to whether he has to check the consolidation or go through the regular audit procedure after going through the report of the Branch Auditor.

(b) Write a short note on dormant company.

Answer:

The provisions relating to dormant company are explained as follows:

Application by a company to the registrar for obtaining the status of dormant company

(i) A company may make an application to the Registrar so as to obtain the status of a dormant company in the following cases:
   1. It was formed and registered under the Companies Act, 2013 for a future project or to hold an asset or intellectual property and it has no significant accounting transaction.
   2. It is an inactive company.

(ii) The application shall be made to the Registrar in such manner as may be prescribed.

Provisions contained in Rule 3 of the Companies (Miscellaneous) Rules, 2014.

(i) The application shall be made to the Registrar in Form MSC-1.

(ii) The application may be made, only if-
   1. a special resolution to this effect is passed in the general meeting of the company; or
   2. a notice is issued to all the shareholders of the company for this purpose and consent of at least 3/4th shareholders (in value) is obtained.

Meaning of 'inactive company'

'Inactive company' means-

(i) a company which has not been carrying on any business or operation; or
(ii) a company which has not made any significant accounting transaction during the last 2 financial years; or
(iii) a company which has not filed financial statements and annual returns during the last 2 financial years.

Meaning of 'significant accounting transaction'

'Significant accounting transaction' means any transaction other than -

(i) payment of fees by a company to the Registrar;
(ii) payments made by it to fulfil the requirements of this Act or any other law;
(iii) allotment of shares to fulfil the requirements of this Act; and
(iv) payments for maintenance of its office and records.

Grant of status of dormant company by the Registrar

(i) After considering the application made by the company, the Registrar shall allow the status of a dormant company to the applicant company.
(ii) The Registrar shall issue a certificate in the prescribed form. As per Rule 4 of the Companies (Miscellaneous) Rules, 2014, the Registrar shall, after considering the application, issue a certificate in Form MSC-2 allowing the status of a Dormant Company to the applicant.

Register of dormant companies to be maintained by the Registrar

(i) The Registrar shall maintain a register of dormant companies.
(ii) The register shall be maintained in the prescribed form.

Compliance requirements for a dormant company

(i) To retain its dormant status, a dormant company shall have such minimum number of directors, file such documents and pay such annual fee as may be prescribed.
(ii) If a dormant company fails to comply with these requirements, the Registrar shall strike off its name from the register of dormant companies.

Option of dormant company to become an active company

(i) A dormant company may become an active company by making an application to the Registrar in this behalf.
(ii) The application shall be accompanied by such documents and such fees as may be prescribed,

If a company does not file financial statements or annual returns for 2 consecutive financial

years, the Registrar shall issue a notice to that company and enter the name of such company in the register maintained for dormant companies.

(c) The principal business of Vriddhi Company Ltd. was the acquisition of vacant plots of land and to erect the houses. In the course of transacting the business, the Chairman of the Company acquired the knowledge of arranging finance for the development of land. The Vriddhi Company introduced a financier to another company Janata Ltd. and received an agreed fee of ₹ 2 lakhs for arranging the finance. The Memorandum of Association of the company authorises the company to carry on any other trade or business which can in the opinion of the board of directors, be advantageously carried on by the company in connection with the company's general business. Referring to the provisions of the Companies Act, examine the validity of the contract carried out by Vriddhi Company Ltd. with Janata Ltd.

Answer:

Arranging finance or financer is an ultra vires act since it falls outside the object clause of memorandum and since an object contained in the object clause is not valid if it authorises the company to carry on any other trade or business which can be advantageously carried on by the company.

The contract entered into by the company is ultra vires since the company has no power to arrange finance or financer. The Board cannot take the defense that the memorandum authorises the company to carry on any business which can be advantageously carried on in connection with company's present business (since, it is a 'specified purpose' given u/s 17 for alteration of object clause, but it cannot be the ground or basis for carrying on a business which is outside the object clause). The memorandum to be first altered by complying with the requirements of Sec. 17, and afterwards the business of arranging finance is carried on.

Question 8.

(a) The Paid Up Share Capital and Free Reserves of Sucheta Co Ltd, a Public Company is ₹ 100 Crores as on 1st April. The Shareholders of the Company at their General Meeting held on 4th April, by a Special Resolution authorized the Board of Directors of the Company to borrow money "exceeding the Paid Up Share Capital and Free Reserves of the Company, to the extent required by the Board of Directors". The Board of Directors as a result borrowed money to an extent of ₹ 130 Crores, including ₹ 20 Crores as Short-Term Loan and ₹ 25 Crores as Temporary Loan for financing the construction of a building of the Company. Examine the validity of the following -

(i) The Board's exercising the powers for borrowing money to an extent of ₹ 130 Crores.

(ii) What would be your answer in case the Company's Paid Up Share Capital and Free Reserves increased to ₹ 150 Crores and the Board of Directors borrow money to an extent of ₹ 140 Crores which neither include any short term loan nor temporary loan

for financing of the construction of a building of the Company?

Answer:

Situation 1:

Loans Analysis: Total Borrowings of ₹ 130 Crores is analysed u/s 180(1)(c) as under -

(i) ₹ 20 crores - Short Term Loan - assumed repayable within 6 months - not considered in ceiling limit.
(ii) ₹ 25 Crores -Temporary Loan but for capital purpose - included in ceiling limit.
(iii) ₹ 85 Crores - Other Loans - included in ceiling limit.

Loans above Ceiling Limit: Total Borrowings u/s 180(1)(c) = ₹ 110 Crores, exceed the aggregate of Paid Up Capital and Reserves of the Company ₹ 100 Crores. Hence approval in General Meeting by Special Resolution, specifying the amount of borrowing is required, to make the Borrowing valid.

Nature of Resolution: Here, the resolution is defective since it does not specify the amount that may be borrowed by the Company.

Conclusion: So, the Management of the Company should convene an EGM and pass a special resolution as required u/s 180(1)(c), to make the borrowing valid and binding on the Company and its Members.

Situation 2:

If the Paid Up Capital and Free Reserves is increased to ₹ 150 Crores, then the Borrowings of ₹ 140 Crores is within the powers of the Board and hence the same is valid. Shareholders' approval is not required in such case.

(b) Explain the duties of officers and employees and powers of the inspector in case of investigation, in line with section 217 of Companies Act, 2013.

Answer :

Duties of officers and employees [Section 217(1)]

It shall be the duty of all officers and other employees and agents including the former officers, employees and agents of a company which is under investigation, and where the affairs of any other body corporate or a person are investigated under section 219, of all officers and other employees and agents including former officers, employees and agents of such body corporate or a person –

(i) to preserve and to produce to an inspector or any person authorised by him in this

behalf all books and papers of, or relating to, the company or, as the case may be, relating to the other body corporate or the person, which are in their custody or power; and

(ii) otherwise to give to the inspector all assistance in connection with the investigation which they are reasonably able to give.

Furnishing of information or production of books on an order by inspector [Section 217(2)]

The inspector may require any body corporate, other than a body corporate whose affairs are investigated under section 219, to -

(i) furnish such information as may be relevant or necessary for the purposes of his investigation; or

(ii) produce such books and papers as may be relevant or necessary for the purposes of his investigation.

Period of retention of books by the inspector [Section 217(3)]

(i) The inspector shall not keep in his custody any books and papers produced under the provisions of this section for more than 180 days.

(ii) He shall return the same to the company, body corporate, firm or individual by whom or on whose behalf the books and papers were produced.

(iii) The books and papers may be called for by the inspector if they are needed again for a further period of 180 days by an order in writing.

Examination on oath [Section 217(4)]

(i) An inspector may examine on oath all officers and other employees and agents including the former officers, employees and agents of the company which is under investigation.

(ii) Where the affairs of any other body corporate or a person are investigated under section 219, an inspector may examine on oath all officers and other employees and agents including former officers, employees and agents of such body corporate or person.

(iii) An inspector may examine on oath any other person with the prior approval of the Central Government. However, in case of an investigation under section 212, the prior approval of Director, Serious Fraud Investigation Office shall be sufficient.

Other powers of the inspectors [Section 217(5)]

Notwithstanding anything contained in any other law for the time being in force or in any contract to the contrary, the inspector, being an officer of the Central Government, making an investigation under this Chapter shall have all the powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit in respect of the following matters:

(i) The discovery and production of books of account and other documents, at such

place and time as may be specified by such person.

(ii) Summoning and enforcing the attendance of persons and examining them on oath.

(iii) Inspection of any books, registers and other documents of the company at any place.

Notes of examination [Section 217(7)]

I. Where any person is examined on oath, the notes of such examination shall be –
   (i) taken down in writing;
   (ii) read over to, or by, the person examined;
   (iii) signed by the person examined.

II. The notes of examination on oath may be used as evidence against such person.

Duty of certain persons to assist the inspector [Section 217(9)]

The officers of the Central Government, State Government, police or statutory authority shall provide assistance to the inspector for the purpose of inspection, inquiry or investigation, which the inspector may, with the prior approval of the Central Government, require.

Reciprocal agreements with foreign countries [Section 217(10)]

The Central Government may enter into an agreement with the Government of a foreign State for reciprocal arrangements to assist in any inspection, inquiry or investigation under this Act or under the corresponding law in force in that State.

Reference of a matter by Indian Court to the Foreign Court [Section 217(11)]

I. If, in the course of an investigation into the affairs of the company, an application is made to the competent court in India by the inspector stating that evidence is, or may be, available in a country or place outside India, such court may issue a letter of request to a court or an authority in such country or place, competent to deal with such request, to -
   (i) examine orally, or otherwise, any person, supposed to be acquainted with the facts and circumstances of the case;
   (ii) record his statement made in the course of such examination;
   (iii) require such person or any other person to produce any document or thing, which may be in his possession pertaining to the case;
   (iv) forward all the evidence so taken or collected or the authenticated copies thereof or the things so collected to the court in India which had issued such letter of request.

II. The letter of request shall be transmitted in such manner as the Central Government may specify in this behalf.

III. Every statement recorded or document or thing received under this sub-section shall be deemed to be the evidence collected during the course of investigation.

Foreign Court to refer the matter to Indian Court [Section 217(12)]

Upon receipt of a letter of request from a court or an authority in a country or place outside

India, competent to issue such letter in that country or place for the examination of any person or production of any document or thing in relation to affairs of a company under investigation in that country or place, the Central Government may, if it thinks fit, forward such letter of request to the court concerned, which shall thereupon -

(i) summon the person before it;
(ii) record his statement;
(iii) cause any document or thing to be produced;
(iv) send the letter to any inspector for investigation, who shall thereupon investigate into the affairs of company in the same manner as the affairs of a company are investigated under this Act and the inspector shall submit the report to such court within 30 days or such extended time as the court may allow for further action.

Transmission of evidence by Indian Court to CG and by CG to Foreign Court [Proviso to Section 217(12)]

The evidence so taken or collected or copies of the evidence so authenticated or the things so collected shall be forwarded by the court, to the Central Government for transmission, in such manner as the Central Government may deem fit, to the court or the authority in country or place outside India which had issued the letter of request.

(c) Raj Limited allotted 500 fully paid-up shares of ₹ 100 each to Ashu, a minor, in response to his application without knowing that he was a minor and entered his name in the Register of members. Later on, the company came to know of the fact. The company cancelled the allotment and struck-off his name from the Register of members and also forfeited his entire share money. He filed a suit against the action of the company. Decide whether Ashu would be given any relief by the court under the provisions of the Companies Act.

Answer.

The cancellation of allotment of shares to minor is not valid since a minor can become a member, if the shares are fully paid up and there is no question of liability of minor if the shares are fully paid up.

Forfeiture of money paid by the minor is not valid as the company has no right to cancel the allotment to minor. Even in a case where partly paid shares are allotted to a minor, and afterwards such allotment is repudiated by the company, the company has no right to forfeit the money paid by the minor, i.e. the minor is entitled to receive back the money paid by him.

Question 9.

(a) Mango Ltd is a Public Limited Company. It has a Paid Up Share Capital of ₹ 10 Crores. It is engaged in software development for export. It was promoted by Mr. Sweet, who is an NRI (a Foreign Resident of Indian origin), and his friend Mr. Honey, who is an Indian Citizen

resident in India.

Currently, Mr. Honey is heading the Company in India as the President. However, Mr. Sweet is the main business strategy formulator, and also actively renders several services outside India to the Company, and also advises the Board of Directors of the Company. But he is stationed in the USA and visits India for hardly 10 days a year.

The Company desires to know from you, whether they can appoint Mr. Sweet, as the "Managing Director", to comply with Sec.196 of the Companies Act, and pay him a salary in foreign exchange. They also desire that you advise them as to whether the said appointment can be made in terms of FEMA, 1999. Give a reasoned answer, duly supported by analysis of the relevant legal provisions applicable to the issue in question.

Answer :

Every Public Company having a Paid-Up Share Capital ≥ ₹ 10 Crores shall have a MD / WTD / Manager / CEO. Here Mango Ltd must have a whole-time KMP.

Only a person who fulfils the following conditions shall be eligible to be appointed as MD / WTD / Manager, without the approval of Central Government –

1. He had not been sentenced to imprisonment for any period or to a fine exceeding ₹ 1,000, for the conviction of any offence under any of the following Acts –
   a. The Indian Stamp Act, 1899
   b. The Central Excise Act, 1944
   c. The Industrial (Development & Regulation) Act, 1951
   d. The Prevention of Food Adulteration Act, 1954
   e. The Essential Commodities Act, 1955
   f. The Companies Act, 2013
   g. The Securities Contracts (Regulation) Act, 1956
   h. The Wealth Tax Act, 1957
   i. The Income Tax Act, 1961
   j. The Customs Act, 1962
   k. The Competition Act, 2002
   l. The Foreign Exchange Regulation Act, 1999
   m. The Sick Industrial Companies (Special Provisions) Act, 1985
   n. The Securities and Exchange Board of India Act, 1992
   o. The Foreign Trade (Development and Regulation) Act, 1992
   p. The Prevention of Money Laundering Act, 2002

2. He had not been detained for any period under the conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974.

3. He has completed the age of 21 years and he has not attained the age of 70 years. Approval of Central Government would not be required if a person has attained the age

of 70 years and is appointed by special resolution of the company at a general meeting.

4. Where he is a managerial person in more than one company, his remuneration from one or more companies is subject to the ceiling provided in schedule V.

5. He is resident of India.

Exception: The condition as to Resident is not applicable to Companies in SEZ, if a person who is a Non-Resident in India enters India only after obtaining a proper employment visa from the Indian mission abroad.

Note:

(i) Definition of Resident: Resident in India includes a person -
   (a) who has been staying in India for a continuous period of not less than 12 months immediately preceding the date of his appointment as a Managerial Person, and
   (b) who has come to stay in India
      - for taking up employment in India, or
      - for carrying on a business or vocation in India.

(ii) Waiver of condition (1) & (2) above, i.e. the disqualification of conviction or detention can be waived by the Central Government. If the Central Government has granted its approval to the appointment of the person convicted or detained, no further approval of the Central Government shall be necessary for the subsequent appointment of that person if he had not been so convicted or detained subsequent to such approval.

In the above case, Mr. Sweet is not a person "resident in India', since he is stationed in USA and comes to India for hardly 10 days in a year. If Sweet is appointed as MD, it is not as per Schedule V. So, Sweet is not qualified for appointment without the approval of Central Government.

Sweet is a person resident outside India, under FEMA, 1999. Payment of Salary to Sweet is a Current Account Transaction under FEMA, 1999 which is not specifically prohibited. Hence, the Company can pay him the Salary in Foreign Exchange subject to compliance with Managerial Remuneration Requirements under Companies Act, and TDS requirements under Income-Tax Act.

(b) Board of Directors of M/s. Rimjhim Ltd. in its meeting held on 29th May, 2009 declared an interim dividend payable on paid up Equity Share Capital of the Company. In the Board Meeting scheduled for 10th June, 2009, the Board wants to revoke the said declaration. You are required to state with reference to the provisions of the Companies Act, 1956 whether the Board of Directors can do so.

Answer.

As per section 2(35) of the Companies Act, 2013, dividend includes any interim dividend. Therefore, all the provisions applicable to final dividend shall equally apply to interim dividend.

Thus, interim dividend once declared, like final dividend, is a debt due from the company. Accordingly, once declared, interim dividend cannot be revoked except under the same circumstances in which the final dividend can be revoked.

The amount of interim dividend is to be compulsorily deposited in a separate bank account, within 5 days of passing the Board resolution declaring the interim dividend [Section 205(1A)].

The provisions contained in sections 205, 205A, 205C, 206, 206A of the Companies Act, 1956 and Section 127 of the Companies Act, 2013 shall, as far as may be, also apply to any interim dividend [Section 205(1C) of the Companies Act, 1956].

As per section 127 of the Companies Act, 2013, dividend must be paid within 30 days of its declaration. Thus, interim dividend must also be paid within 30 days of its declaration, i.e., within 30 days of date of passing the Board resolution declaring the interim dividend.

In the instant case, on declaration of interim dividend by the Board in a Board Meeting held on 29th May, 2009, the Liability of the company to pay the interim dividend has become certain, and the payment of interim dividend must be made within next 30 days, viz. on or before 28th June 2009.

Therefore, revocation of interim dividend in the Board Meeting held on 10th June is not possible.

(c) What are the grounds for rejection of DIN application?

Answer:

A provisional DIN is approved only after scrutiny of the documents attached with the application. Some of the common mistakes committed by applicants and on account of which the DIN application gets rejected are as under –

(i) The DIN application fee is not paid

(ii) Non-submission of supporting documents

- The proof of identity of the applicant is not submitted.
- The proof of father's name of the applicant is not submitted.
- The proof of date of birth of the applicant is not submitted.
- The proof of residential address of the applicant is not submitted.
- The Affidavit (for applicant or his/her father's name being a single name) is not submitted.
- The copy of passport (for foreign nationals) is not submitted.

(iii) Invalid Application/supporting Documents

- The supporting documents are invalid or expired.
- The proof of identity submitted has not been issued by a Government Agency.
- The application/enclosed evidence has handwritten entries.
- The submitted application is a duplicate DIN application and already one application of that applicant is pending or approved.
- The submitted application does not have photograph affixed.
- The signatures are not appended to the prescribed place.
- The applicant's name filled in application form does not match with the name in the enclosed evidence.
- The applicant's father's name filled in application form does not match with the father's name in the enclosed evidence.
- The applicant's date (DD/MM/YY) of birth filled in application form does not match with the date of birth in the enclosed evidence.
- The address details filled in the application do not match with those contained in the enclosed supporting evidence.
- The prefixes/ suffixes like Mr. / Ms. / Kumari / Shri / Late/Ji etc. are used in the applicant's name or applicant's father's name field in Form DIN-1.
- The gender is not entered correctly in Form DIN-1.
- Identification number entered in application does not match with the identity proof enclosed.
- Application does not contain the valid Service Request Number (SRN) through which the DIN application fee is paid.

(iv) Improper Attestation of documents

- The attesting authority has not put his signature.
- The documents have not been attested by authorized person.
- Applicant's photograph has not been attested by an authorized person.
- The proof of identity has not been attested by an authorized person.
- The proof of father's name has not been attested by an authorized person.
- The proof of date of birth of the applicant has not been attested by an authorized person.
- The proof of residential address has not been attested by an authorized person.
- The particulars of the attesting authority are incomplete (e.g. professional's name, designation, membership number, stamp/seal).

Question 10.

(a) Advise the Board of directors of a public company about their powers in respect of the following proposals explaining the relevant provisions of the Companies Act, 2013:
"Delegating to the managing director of the company the power to invest surplus funds of the company in the shares of some companies."

Answer:

As per section 179(1) of the Companies Act, 2013, the Board is entitled to exercise all such powers as the company is authorised to exercise. Similarly, the Board is authorised to do all such acts and things as the company is authorised to do. However, the provisions of section 179(1) of the Companies Act, 2013 are subject to the other provisions of the Companies Act, 2013 (e.g. Sections 179(3), 180, 181 and 182 of the Companies Act, 2013).

As per section 179(3) of the Companies Act, 2013, the powers relating to investment of funds of the company shall be exercised by the Board at a Board meeting only. However, such power may be delegated by the Board, subject to the following:

(i) The power to invest the funds of the company may be delegated to a committee of directors, managing director, manager, a principal officer of the company or a principal officer of the branch office.
(ii) The delegation of power shall be made by passing a resolution at a Board meeting.
(iii) The Board may delegate such power subject to such conditions as it may deem fit.

However, as per section 186 of the Companies Act, 2013, acquisition of securities of any body corporate shall be made by passing a unanimous resolution at a Board meeting only. Therefore, as per section 186, the power to invest the funds in the shares of other companies cannot be delegated.

In the present case, the power to invest surplus funds of the company in the shares of some companies is proposed to be delegated to the managing director of the company. Such delegation is not permissible in view of provisions of section 186 of the Companies Act, 2013. .

(b) In a Public Company the total number of Directors are 9 and 2 offices of the Directors have fallen vacant. In such case,

(i) How is the total strength of the Board determined at a Board Meeting?
(ii) What would be the quorum for the Board Meeting?
(iii) Assuming if there are 15 Directors in the Company and of which 13 are Interested Directors, what would be the quorum?
(iv) How do you resolve the situation if all the Directors are interested in a particular transaction?

Answer :

(i) Total Strength of the Board = 9-2 = 7 Directors.

(ii) Quorum = 1/3rd of 7 = 2.33 = 3 Directors.

(iii) If no. of interested directors exceeds or is equal to 2/3rd of the total strength, the quorum = No. of Non-Interested Directors (or) 2, whichever is higher. So, Quorum = 2.

(iv) Where all or more than 2/3rd of the Directors are interested, the remedy in such cases is to increase the strength of the Board by appointing disinterested Directors or appoint Additional Directors if so authorised by the AOA, who are not interested in the contract. If this is not found practicable, it will be desirable to place the proposed contract before the General Meeting for consent.

(c) M/s Clash Ltd. is a company controlled by two family groups. The first family group has four directors, namely, Mr. A, Mr. B, Mr. C and Mr. D on the Board of directors. The second family group has two representatives Mr. X and Mr. Y on the Board. Because of internal family troubles, the first group, by virtue of its majority shareholding removed both Mr. X and Mr. Y as the directors of the company. Aggrieved by this action the second group is planning to move an application before the Company Law Board. You have been approached for advice. Advise as to the eligibility restrictions regarding filing the application and the chances of getting the relief from the Company Law Board, assuming that there is no other material on record in support of oppression on the minority group.

Answer:

The management of the company is based on the Majority Rule. The Courts do not usually intervene in the matters of internal management of the company. However, where the exercise of voting power by the majority results in oppression on the members or results in mismanagement or prejudice to public interest, the Company Law Board may grant the relief to the minority.

As per section 399, the eligibility criterion to file an application with the Company Law Board for claiming relief from oppression or mismanagement is as follows:

(i) In the case of a company having a share capital. Members eligible to apply shall be the lowest of the following:
   1. 100 members; or
   2. 1/10th of the total number of members; or
   3. Members holding not less than 1/10th of the issued share capital of the company.

(ii) In the case of a company having no share capital. The application shall be made by at least 1/5th of total number of members.

The applicants must have paid all the calls and other sums due on their shares. The applicants must hold the requisite number of shares at the time of filing the application.

In the present case, the removal of two directors cannot, *ipso facto*, amount to an act of mismanagement or an act prejudicial to public interest. Also, it does not amount to oppression because –

- The election and removal of directors is the prerogative of the members and such an act cannot *ipso facto* be treated as oppression on minority, unless the conduct of the majority is based on malafide considerations.
- The conduct can be said to be oppression only when it is burdensome, harsh and

wrongful. Oppression involves an element of lack of probity and fair dealings to a member. Mere removal of two directors does not amount to oppression.

- The oppression complained of must affect a person in his capacity as a member of the company. Oppression in any other capacity, i.e., as a director of a company is outside the purview of section 397.
- The relief is available only when the acts complained of are shown to be continued acts of oppression.
- The relief is available only if it is established that oppression is so severe that there is just and equitable ground for winding up of the company.

In the given case, it has been made clear that there is no other material on record in support of oppression on the minority. Since the conditions specified in section 397 have not been fulfilled, there is no oppression on the second family group and therefore relief from Company Law Board cannot be claimed.

Question 11.

(a) A two year old Producer Company registered under Section 581C of the Companies Act, 1956 wants to donate some amount. The Chief Executive of the Producer Company has approached you to advise him as to how and for what purposes the donation can be made by such company. Also state the monetary restrictions, if any, laid down in the Companies Act, 1956 on making donations by a Producer Company. You are informed that as per the Profit & Loss account of the Producer Company for its last accounting year, net profit was ₹ 20.00 lacs.

Answer :

The provisions relating to Donations or subscription by a Producer company are contained in section 581ZH. The answers to the given problems are as under:

(i) **How to make the donation?** A special resolution shall be required for making any donation or subscription.

(ii) **Purposes for which donation can be made**. The donation or subscription may be made to any institution or individual for the purposes of -

1. promoting the social and economic welfare of Producer Members or producers general public; or
2. promoting the mutual assistance principles.

Prohibition on political contribution. A Producer Company shall not -

1. make any contribution or subscription to a political party;
2. make any contribution or subscription to any person for any political purpose;
3. make available any facilities including personnel or material to a political party or any person for any political purpose.

(iii) **Monetary restrictions on donations.** The aggregate amount of all such donation and subscription in any financial year shall not exceed 3% of the net profit of the preceding financial year of the Producer Company. Accordingly, in the given case, the donation

in the current year shall not exceed ₹ 60,000.

(b) One of the Joint Auditors appointed by the Company in its AGM has resigned. Comment.

Answer:

Resignation of one of the Joint Auditors constitutes a Casual Vacancy. Since it is caused by resignation, another Auditor may be appointed in his place by the BOD and approved the Company in a General Meeting within 3 months of BOD recommendation. Also, there is no bar for the Company to resolve in a General Meeting that the other appointed Joint Auditor shall continue as the Sole Auditor of the Company.

Even if one of the Joint Auditors has resigned, the Other Joint Auditor validly appointed by the Company in its AGM can continue the audit work.

(c) Superclean Industries (P) Ltd is a Company in which there are 3 Shareholders and all of them are Directors of the Company. Superman holds 60% of the Paid-Up Share Capital while the balance 40% of Shares is held equally by the remaining Directors. Because of some rift among them, the two Directors holding 40% Share Capital have aligned and started preventing the holding of any Meetings of the Company. The AOA of the Company provide for a minimum of 2 Directors / Members as Quorum for Board Meetings as well as General Meetings. Superman has become helpless and seeks your advice to tackle the situation. Advice.

Answer:

Mr. Superman can take steps to remove the 2 Directors who are obstructing the holding of a Meeting with a view to continue and prevent the majority Shareholder from exercising his right. Sec. 169 gives a statutory right to Members to remove a Director by Ordinary Resolution. Thus where one of the only 2 Shareholders / Directors who was holding 51% of the Shares wanted to remove his fellow Director who did not attend the meeting to frustrate him because the AOA required quorum of two, Tribunal can order a meeting to be called with the presence of one as sufficient quorum.

The right of the majority Director / Shareholder to remove other Directors cannot be permitted to be vetoed by the quorum requirement. Where the Directors attempt to avoid their removal, by omitting to call a Meeting or by not attending the Meeting with a view to creating a situation of no quorum, the Court /Tribunal / Central Govt can convene the necessary Meeting. [Re El Sombrero Ltd]

(d) Mr. A was appointed Auditor of AAS Ltd by the Board to fill the casual vacancy that arose due to death of the Auditor originally appointed in AGM. Subsequently, Mr. A also

resigned on health grounds during the tenure of appointment. The Board filled this vacancy by appointing you through duly passed Board resolution. Comment.

Answer:

Appointment by Board Resolution to fill the Casual Vacancy caused due to resignation is valid. But, the Appointment should be approved by the Company in a General Meeting, convened within 3 months of BOD recommendation. Recommendations of Audit Committee u/s 177 shall also be considered, if applicable to the Company.

Question 12.

(a) Under the Articles of Association of Sunshine Ltd. Company directors had power to borrow up to ₹ 10,000 without the consent of the general meeting. The Directors themselves lent ₹35,000 to the company without such consent and took debentures of the Company. Decide under the provisions of the Companies Act, whether the company is liable? If so, what is the extent of liability of the company in this case?

Answer:

The company is not liable for ₹ 35,000	– since the benefit of doctrine of indoor management can be availed of only by an outsider who has no knowledge of any irregularity in the internal management of the company.
The liability of the company is limited to ₹ 10,000	– since the directors, having knowledge of the fact that the limit of borrowings specified under the articles would be exceeded, themselves lent ₹ 35,000 without the consent of the general meeting; – since on the similar facts as in the given case, same decision was given in **Howard v Patent Ivory Manufacturing Company.**

(b) O&C Ltd. was a supplier of raw material to SAM Ltd., which could not make payment to O&C Ltd. owing to huge losses and financial constraints. Ultimately, SAM Ltd. went into liquidation and Official Liquidator was appointed. O&C Ltd. filed a suit for recovery of its dues. The Court awarded a decree in favour of O&C Ltd. Armed with the Court's decree, O&C Ltd. approached the Official Liquidator to pay the amount to it in preference over dues of the workmen. The workmen protested the demand of O&C Ltd. and contended that their dues rank pari passu with the secured creditors and will override all other claims of other creditors even where a decree has been passed. You are required to ascertain the validity of the argument of the workmen in the light of the provisions of the Companies Act, 1956 and the decided cases on the subject.

Answer:

The given problem relates to section 529A of the Companies Act, 1956.

The duty of the liquidator is to ensure that the property of the company is applied in satisfaction of its liabilities amongst its just and proper creditors, i.e., the persons who are justly, legally and properly creditors.

As per section 529A, following debts shall be paid in priority to all other debts.

(i) Workmen's dues.
(ii) Debts due to secured creditors to the extent such debts rank pari passu with workmen's dues.

The effect of section 529A is that, in the event of liquidation, the assets of the company remain charged for the payment of workmen's dues and such charge will be pari passu with the claim of the secured creditors. In other words, the dues of the workmen and debts due to the secured creditors are to be treated pari passu and have to be paid in priority to all other dues. Thus, by operation of law (i.e., section 529A), the 'workmen dues' amount to over-riding preferential payments and are entitled to proportional payment along with secured creditors.

Where an unsecured creditor obtains a Court decree, he does not become a secured creditor [Ananta Mills Ltd. v City Deputy Collector, Ahmedabad]. Accordingly, section 529A overrides claims of the unsecured creditors even where a decree has been passed by the Court.

In the given case, the Court has passed a decree in favour of O&C Ltd. to recover the price of raw materials supplied to SAM Ltd. However, such decree does not make O&C Ltd. a secured creditor. Therefore, the assets of the company shall be first applied towards payment of workmen's dues and debts due to secured creditors.

The contention of the workmen of SAM Ltd. is correct. The payment to O&C Ltd. cannot be made until the claims of the workmen are fully satisfied.

(c) **What activities are excluded from CSR? Discuss the manner of CSR activities.**

Answer:

The following activities are excluded from CSR:

(i) Activities undertaken in pursuance of normal course of business of the Company.
(ii) Activities undertaken outside India.
(iii) Activities that benefit only the Employees of the Company and their families.
(iv) Contribution of any amount, directly or indirectly, to any Political Party, u/s 182.
(v) Expenditure on an item not in conformity or not in line with activities specified in

Schedule VII.

(vi) One-off events like Marathons, Charitable Contribution, Advertisement, Sponsorship of TV Programmes

(vii) Expenses in fulfillment of Statue / Regulations (Labour Law, Land Acquisition Act, etc.)

Manner of CSR activities

(i) CSR Activities shall be undertaken as per the Company's stated CSR Policy, as projects or programs or activities (either new or ongoing).

(ii) CSR Activities may be undertaken by - (a) a Registered Trust, or (b) a Registered Society, or (c) a Company established by the Company or its Holding / Subsidiary / Associate Co. u/s 8 or otherwise.

(iii) If the Trust / Society / Co. is not established by the Company or its Holding / Subsidiary / Associate -

- such Trust, etc. shall have an established track record of 3 years in undertaking similar programs or projects, and
- the Company has specified - (i) the project / programs to be undertaken through these Entities, (ii) modalities of fund utilization, and (iii) monitoring and reporting mechanism.

(iv) A Company may also collaborate with other Companies for undertaking CSR activities, such that the CSR Committees of respective Companies are in a position to report separately on CSR Projects.

(v) CSR Exp. by Foreign Holding Co, routed through Indian Subsidiary, qualifies for Indian Subsidiary.

(vi) Corpus Contribution to Trust/Society/Sec.8 Companies is eligible CSR Expenditure, if - (i) Trust, etc. engaged exclusively for CSR, and (ii) Contribution exclusively relatable to Sch VII purposes only.

(vii) Companies may build CSR capacities of their own personnel as well as those of their Implementing agencies through Institutions with established track records of atleast 3 Fin. Years. Such expenditure including AOH shall not exceed 5% of total CSR expenses of the Company in One Financial Year.

Question 13.

(a) The annual general meeting of a company was held in November, 2013. The company did not hold any general meeting in 2014. R, S and T are the directors liable to retire at the general meeting. Can they continue in office?

Answer:

At every annual general meeting, 1/3rd (or nearest to 1/3rd) of rotational directors shall retire from office [Section 152(6)]. As a general rule, the directors who are liable to retire at an annual general meeting cannot continue in office after the last day on which the annual general meeting should have been held. This is because the calling of annual general

meeting is a duty and responsibility of the directors. They cannot, by omitting to call the annual general meeting, take advantage of their own default and by that means extend their tenure of office [B.R. Kundra v Motion Pictures Association (1976) 46 Comp Cas 339]. Also, the rule of automatic reappointment does not apply to a case where annual general meeting is not held.

The annual general meeting of the company must be held not later than 15 months from the date of its previous annual general meeting. Further, an annual general meeting must be held in each calendar year. The registrar has the power to grant extension of time for holding the annual general meeting by a period not exceeding 3 months.

The answer to the given problem is as under:

(a) The annual general meeting must be held on or before 31.12.2014. If it is not so held, the directors, R, S and T shall cease to hold office on 31.12.2014. Their continuance beyond this date shall be invalid.

(b) However, if the registrar grants extension of time for holding the meeting, the meeting can be held upto 31.3.2015 and so directors can continue in office till that date. However, if annual general meeting is not held upto 31.3.2015, the directors, R, S and T shall cease to hold office on 31.3.2015. Their continuance beyond this date shall be invalid.

(b) Parth Ltd. desires to appoint an additional director on its board of directors. The Articles of the company confer upon the board to exercise the power to appoint such a director. As such Manav is appointed as an additional director. In the light of the provisions of the Companies Act, 2013 examine:

(i) Whether Manav can continue as director if the annual general meeting of the company is not held within the stipulated period and is adjourned to a later date?

(ii) Can the power of appointing additional director be exercised by the Annual General Meeting?

Answer:

The provisions relating to additional director are contained in section 161(1) of the Companies Act, 2013. Applying these provisions, the given problem is answered as under:

(i) An additional director holds office upto the date of next annual general meeting or the last day on which the annual general meeting should have been held, whichever is earlier.

In the given case, the ASM could not be held as scheduled, and is adjourned to a later date. Therefore, Manav shall have to vacate his office on the last day on which the annual general meeting ought to have been held as per section 96 of the Companies Act, 2013.

(ii) The power to appoint additional directors is expressly conferred on the Board of directors by Section 161(1) of the Companies Act, 2013. Accordingly, it is not possible for the members to exercise this power. Thus, additional directors cannot be appointed in the annual general meeting or any other general meeting [Blair Open Hearth Furnace

Co. Ltd. v Reigart(1914) 1 Ch. 390].

However, in some exceptional cases like when there is a deadlock in the Board or where all the directors become interested, the power to appoint additional directors may be exercised by the members [Barron v Potter (1914) 1 Ch 895].

(c) State the provisions of the Companies Act, 2013 authorising filing of applications, service of notices and inspection of documents in electronic form.

Answer:

Section 398 empowers the Central Government to make Rules with respect to filing of documents, service of notices, maintenance of records etc. by way of electronic form, as explained below:

The Central Government may make rules so as to require that -

(i) such applications, balance sheet, prospectus, return, declaration, memorandum, articles, particulars of charges, or any other particulars or document as may be required to be filed or delivered under this Act or the rules made thereunder, shall be filed in the electronic form and authenticated in such manner as may be prescribed;

(ii) such document, notice, communication or intimation, as may be required to be served or delivered under this Act, may be served or delivered in the electronic form and authenticated in such manner as may be prescribed;

(iii) such applications, balance sheet, prospectus, return, register, memorandum, articles, particulars of charges, or any other particulars or document and return filed under this Act or rules made thereunder shall be maintained by the Registrar in the electronic form and registered or authenticated, as the case may be, in such manner as may be prescribed;

(iv) such inspection of the memorandum, articles, register, index, balance sheet, return or any other particulars or document maintained in the electronic form, as is otherwise available for inspection under this Act or the rules made thereunder, may be made by any person through the electronic form in such manner as may be prescribed;

(v) such fees, charges or other sums payable under this Act or the rules made thereunder shall be paid through the electronic form and in such manner as may be prescribed; and

(vi) the Registrar shall register change of registered office, alteration of memorandum or articles, prospectus, issue certificate of incorporation, register such document, issue such certificate, record the notice, receive such communication as may be required to be registered or issued or recorded or received, as the case may be, under this Act or the rules made thereunder or perform duties or discharge functions or exercise powers under this Act or the rules made thereunder or do any act which is by this Act directed to be performed or discharged or exercised or done by the Registrar in the electronic form in such manner as may be prescribed.

Effect of section 398

Section 398 shall apply -

(i) notwithstanding anything to the contrary contained in the Companies Act, 2013, and

(ii) without prejudice to the provisions contained in section 6 of the Information Technology Act, 2000.

Scope of the Rules

The rules made under this section shall not relate to imposition of fines or other pecuniary penalties or demand or payment of fees or contravention of any of the provisions of this Act or punishment therefor.

Question 14.

(a) A meeting of members of a company was convened under the orders of the Court to consider a scheme of compromise and arrangement. The meeting was attended by 200 members holding 5,00,000 shares in aggregate. 70 members holding 4,00,000 shares voted for the scheme. The remaining members voted against the scheme. Examine with reference to the relevant provision of the Companies Act, 1956 whether the scheme is approved by the required majority.

Answer:

The given problem relates to section 391 of the Companies Act, 1956.

Where the scheme of compromise of arrangement is required to be approved by the members, it must be approved by a majority of the members who are present and voting. Such majority of members must also be the members representing three-fourths in the value of members present and voting at the meeting. In other words, a scheme of arrangement between the company and members must be approved by more than 50% of the members who hold at least 75% of the value of shares. It is to be noted that members or creditors not present in the meeting or present in the meeting but abstain from voting, are not to be counted.

Members or creditors may vote in person or by proxy, where the proxies are allowed.

In the given case

Members who attended the meeting	200 members
Shares held by the members who attended the meeting	5,00,000 shares
Members who voted in favour of the scheme	70 members
Shares held by the members who voted in favour of the scheme	4,00,000 shares
Members who voted against the scheme	130 members
Shares held by the members who voted against the scheme	1,00,000 shares

Therefore, it may be concluded that, the scheme has not been approved by the majority of members, present and voting, though it has been approved by the members holding three-fourth of the shares. It is evident that the requirements of approval by members in terms of 'majority in number of members' and 'three-fourths in value of shares' are cumulative, i.e., these are two separate compliances. Accordingly, the scheme has not been approved by the requisite majority, and therefore this scheme shall not be sanctioned by the Court.

(b) Answer the following explaining the relevant provisions of the Companies Act, 1956:

(i) Whether the companies being amalgamated must be companies registered under the Companies Act, 1956?

(ii) Whether the Companies seeking sanction of the court for a scheme of amalgamation must have specific power to amalgamate in the object clause of their Memorandum of Association?

Answer:

(i) For effecting amalgamation of two or more companies, an application shall be made to the Court under section 391 (Section 394). The benefit of section 394 is available only if the transferee company (i.e., new company) is a company within the meaning of Companies Act, 1956. However, the transferor company may be any body corporate, whether a company within the meaning of the Companies Act, 1956 or not. As such, a foreign company can be a 'transferor company' but not a 'transferee company'.
Therefore, a scheme of amalgamation may provide for transfer of foreign companies to Indian companies. Thus, it is not necessary that the companies being amalgamated must be companies registered under the Companies Act, 1956; it is sufficient if the amalgamated company is a company registered under the Companies Act, 1956.

(ii) The memorandum of association explains the scope of operations of a company beyond which the company cannot go. Anything done by a company outside the objects clause of memorandum is ultra vires the company.

However, to amalgamate with another company is a power of the company, and not an object of the company. Therefore, no power to amalgamate is required in the memorandum of a company before making an application to the Court for effecting amalgamation. Also, the power to amalgamate has been given by the statute under section 394. Since there is a statutory provision dealing with amalgamation of companies (which does not require that such a provision must be present in the memorandum or articles of the company), no special power in the objects clause of the memorandum is necessary for its amalgamation with another company. Section 394 is a complete code which gives full jurisdiction to the Court to sanction amalgamation of companies, even though there may be no power in the objects clause of memorandum [Re, EITA India Ltd., AIR 1997 Cal 208; United Bank of India v United India Credit d Development Co. Ltd. (1977) 47 Comp Cos 689, 730 (Cal)].

(c) What are the provisions regarding preservation of accounts and records of a company which has been amalgamated with any other company?

Answer:

The object of section 396A is to prevent the practice of destroying incriminating accounts and records of the company which has been amalgamated with another company.
The books and papers of a company which has been amalgamated with, or whose shares have been acquired by, another company shall not be disposed of without the prior permission of the Central Government. Before granting such permission, the Central Government may appoint a person to examine the books and papers for the purpose of ascertaining whether they contain any evidence of the commission of an offence in connection with the promotion, formation or management of the affairs of the company or its amalgamation or the acquisition of its shares.

Question 15.

(a) Happy Ltd. for a number of years was in various types of business. In order to exit from its non-core business, its management decided to hive off the business of Food Processing by demerging the said business with an associate company, namely, Bonny Ltd. You are required to advise briefly, with reference to the provisions of the Companies Act, 1956, the steps the management should take to give effect to the proposed demerger.

Answer:

For effecting the reconstruction of a company, the provisions of section 394 need to be complied with. Section 394 requires that an application shall be made to the Court under section 391 (under section 391, an application is made to the Court for entering into a compromise or arrangement). Since, demerger is also a kind of reconstruction, Happy Ltd. may demerge its plantation and tourism business or Food Processing business by complying with the provisions of section 394, which are as under:

(i) Happy Ltd. (known as 'transferor company') shall prepare a draft scheme under which the assets and liabilities of Happy Ltd. as comprised in the Food Processing business shall be transferred to the associate company (known as 'transferee company'). The scheme shall specify the necessary details like-
  (i) agreed values for transfer of assets and liabilities;
  (ii) the consideration for the transfer;
  (iii) where the associate company issues shares to the shareholders of Happy Ltd., the exchange ratio of the shares;
  (iv) other terms and conditions.

(ii) An application shall be made to the Court by Happy Ltd. jointly with the Associate company.

(iii) The Court may order that a meeting of the creditors or members or any class of them be called, held and conducted in the manner directed by the Court.

(iv) The Court shall give notice of every application seeking a compromise or arrangement to the Central Government. The Central Government is empowered to make a representation and the Court shall take into account such representation while passing any order in respect of the scheme of compromise or arrangement (Section 394A).

(v) Where a meeting of creditors or members is called, the notice given to them must contain -

1. the terms of the compromise or arrangement;
2. an explanatory statement explaining the effect of compromise or arrangement;
3. a statement explaining any material interests of the directors, managing director, or manager of the company. The effect of those interests on the scheme should be explained stating if and how they are different from the like interests of other persons.

(vi) The meeting shall be held and conducted in the manner as directed by the Court. The scheme must be approved by more than 50% of the members who hold at least 75% of the value of shares.

(vii) The Court has the discretion to sanction the scheme placed before it. Where the Court is satisfied that the scheme is bona fide, it may sanction the scheme.

(viii) The scheme becomes effective only after a certified copy of the order is filed with the registrar. Until such filing the sanctioned scheme remains dormant and no creditor or member can enforce any right under the scheme.

(ix) After the certified copy of the scheme is filed with the registrar, the company shall annex to every copy of memorandum, a copy of such scheme. .

(x) Necessary steps shall be taken to give effect to the scheme as approved by the Court.

(b) Master Ltd created a Floating Charge of its Current Assets in favour of a Bank to secure a Current Account, which was in debit of ₹ 5 Lakhs and also to secure further Working Capital facilities provided by the Bank.

The charge created on 1st January 2013 was duly registered with the ROC. The Bank advanced ₹ 10 Lakhs subsequent to the creation of charge. The Company has gone into voluntary liquidation pursuant to a resolution passed on 1st September 2013. Examine the validity of the floating charge in case it is a Creditors' Voluntary Winding-up, but there is no fraudulent preference. Would your answer be different, if it were a Members' Voluntary winding-up?

Answer:

1. Validity: The Floating Charge shall be valid upto the amount of any cash paid to the Company (either at the time of or after the creation of the charge), and in consideration for the charge, together with interest at 5% p.a. or at such other rate notified by Central Government.

2. Meaning of "in consideration for the charge": The words "in consideration for the charge" mean that the money was paid in consideration of the fact that a charge is created.

Hence, it will be treated as if cash has been paid to the Company, in the following situations -

i) Cash is paid to the Company simultaneously with the creation of the charge, or
ii) Cash is paid a few days earlier to creation of the charge, in reliance upon a promise by the Company to create the charge, or
iii) Cash is paid subsequently to the creation of the charge, and the circumstances clearly indicate that such cash would not have been paid to the Company, had the Company not given the security earlier by way of creation of the Floating Charge.

3. Analysis & Conclusion: In the above case, the Bank would not have advanced ₹ 10 Lakhs to the Company, had the Company not given the security earlier by way of creation of the Floating Charge. Hence, the charge is a valid charge to the extent of ₹ 10 Lakhs, along with interest at 5% p.a. or at such other rate notified by Central Government. The above facts are similar to Re. Yeovil Glove Co. Ltd case.

4. Members vs Creditors Voluntary Winding-up:
   i) Provisions relating to Invalid Floating Charge (Sec.534) is applicable for every winding-up. So, the principles relating to Floating Charge are also applicable in case of a Members Voluntary Winding-up.
   ii) In case of Members Voluntary Winding-up, the Declaration of Solvency would have been made. As the Company is solvent, the Floating Charge may be considered valid for the entire debt of ₹ 15 Lakhs including the pre-existing debt of ₹ 5 Lakhs (at the time of creation of charge).

Question 16.

(a) The statement forwarded with the notice convening a Meeting of its Members pursuant to Court's Direction u/s 391 of Companies Act, 1956 contain only "Exchange Ratio" without details of its calculation. Examine the validity of the Notice.

Answer:

Statement u/s 393 : Notice must be accompanied by a Statement setting forth the terms of compromise or arrangement and explaining its effects and material interests of Directors and effect thereof on the scheme.

Sec. 393 vs Sec.173: The Statement required u/s 393 is different from one required u/s 173. The former does not ordain disclosure of all material facts [In Re. Tata Gil Mills Co. Ltd 14 CLA 13 (Bom.)].

The Statement u/s 393 should contain the Exchange Ratio. But it is not necessary to give details thereof, nor is it necessary to circulate the valuation report to Shareholders. [Hindustan Lever Employees' Union vs Hindustan Lever Ltd 83 CC 30 (SC)] Hence, the statement containing only Exchange Ratio without giving details of calculation of exchange ratio is valid.

(b) A Scheme of amalgamation of X Ltd and Y Ltd was worked out and agreed upon by the respective Companies. Meanwhile, group of shareholders of the one of the amalgamating Companies requisitioned a meeting to compel the Company to withdraw the scheme of amalgamation pending before the Court for its sanction. Is the course of action by the Shareholders tenable? What action you contemplate to be taken by the Board in the situation?

Answer:

Section 396 (read with Rule 79 of the Companies (Court) Rules) provide that after a Scheme is approved at the Statutory Meeting held for the purposes, the Company is under an obligation to present a petition for confirmation of the scheme within 7 days of filing of the report, by the Chairman of such meeting/s.

A scheme of amalgamation affects not merely the Company and its Shareholders, but it also vitally concerns an important body of outsiders, viz. the Creditors of the Company, both secured and unsecured. So, it is important that any opposition to the scheme should be expressed and taken note of in the manner provided in Sec.391 and not by the Shareholders requisitioning a meeting in order to compel the Company to withdraw the petition.

The meeting was requisitioned for a purpose, which was totally different from the purposes for which such meetings are ordinarily held. Therefore, the Shareholders could not requisition such a meeting for compelling the Company to withdraw its petition from the High Court and it is in order for the Board of Directors to refuse to call the meeting. [Centron Industrial Alliance v. Pravin Kantilal]

Question 17.

(a) SEBI received complaints from some investors alleging that Arvind Limited and some brokers are indulging in price manipulation in the shares of Arvind Limited. Explain the powers that can be exercised by SEBI under the Securities and Exchange Board of India Act, 1992 in case the allegations are found to be correct.

Answer:

The given problem relates to Sections 11, 12A, 15HA and 15HB of the Securities and Exchange Board of India Act, 1992.

Price manipulation in the shares of Arvind Ltd. can be considered as fraudulent and unfair trade practice relating to securities market. Therefore, under section 11, SEBI is empowered to exercise the following powers:

(i) Suspend the trading of any security in a recognised stock exchange.

(ii) Restrain persons from accessing the securities market and prohibit any person

associated with securities market to buy, sell or deal in securities.

As per section 15HB, SEBI may impose penalty upto ₹ 1 crore on any person who fails to comply with any provision of the Act, for which no separate penalty has been provided

As per Section 12A, no person shall directly or indirectly -

(i) use or employ, in connection with the issue, purchase or sale of any securities listed or proposed to be listed in a recognised stock exchange, any manipulative or deceptive device or contrivance in contravention of the provisions of this Act or the rules or the regulations made thereunder;

(ii) employ any device, scheme or artifice to defraud in connection with issue or dealing in securities which are listed or proposed to be listed on a recognised stock exchange;

(iii) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person, in connection with the issue, dealing in securities which are listed or proposed to be listed on a recognised stock exchange, in contravention of the provisions of this Act or the rules or the regulations made thereunder.

As per section 15HA, if any person indulges in fraudulent and unfair trade practices relating to securities, he shall be liable to a penalty of ₹ 25 crores or 3 times the amount of profits made out of such practices, whichever is higher.

In the given case, Arvind Limited and the brokers who indulged in price manipulation in the shares of Arvind Limited are liable to oenalty of ₹ 25 crores or 3 times the amount of profits made out of such practices, whichever is higher.

(b) Discuss the role of Audit committee as per the provisions of new clause 49, of Listing agreement.

Answer:

The role of the Audit Committee as per the provisions of new clause 49, of Listing Agreement shall include the following:

1. 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;

2. Recommendation for appointment, remuneration and terms of appointment of auditors of the company;

3. Approval of payment to statutory auditors for any other services rendered by the statutory auditors;

4. Reviewing, with the management, the annual financial statements and auditor's

reportthereon before submission to the board for approval, with particular reference to:

(a) Matters required to be included in the Director's Responsibility Statement to be included in the Board's report in terms of clause (c) of sub-section (3) of section 134 of the Companies Act, 2013.

(b) Changes, if any, in accounting policies and practices and reasons for the same.

(c) Major accounting entries involving estimates based on the exercise of judgment by management.

(d) Significant adjustments made in the financial statements arising out of audit findings.

(e) Compliance with listing and other legal requirements relating to financial statements.

(f) Disclosure of any related party transactions.

(g) Qualifications in the draft audit report.

5. Reviewing, with the management, the quarterly financial statements before submission to the board for approval;

6. Reviewing, with the management, the statement of uses/application of funds raised through an issue (public issue, rights issue, preferential issue, etc.), the statement of funds utilized for purposes other than those stated in the offer document/prospectus/notice and the report submitted by the monitoring agency monitoring the utilisation of proceeds of a public or rights issue, and making appropriate recommendations to the Board to take up steps in this matter;

7. Review and monitor the auditor's independence and performance, and effectiveness of audit process;

8. Approval or any subsequent modification of transactions of the company with related parties;

9. Scrutiny of inter-corporate loans and investments;

10. Valuation of undertakings or assets of the company, wherever it is necessary;

11. Evaluation of internal financial controls and risk management systems;

12. Reviewing, with the management, performance of statutory and internal auditors, adequacy of the internal control systems;

13. Reviewing the adequacy of internal audit function, if any, 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;

14. Discussion with internal auditors of any significant findings and follow up there on;

15. Reviewing 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 and reporting the matter to the board;

16. Discussion with statutory auditors before the audit commences, about the nature and scope of audit as well as post-audit discussion to ascertain any area of concern;

17. To 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;

18. To review the functioning of the Whistle Blower mechanism;

19. Approval of appointment of CFO (i.e., the whole-time Finance Director or any other person heading the finance function or discharging that function) after assessing the qualifications, experience and background, etc. of the candidate;

20. Carrying out any other function as is mentioned in the terms of reference of the Audit Committee.

(c) Is compounding of offences permissible under the SEBI Act, 1992?

Answer:

Section 24A of SEBI Act, 1992 provides for compounding of offences punishable under the Act, i.e. imposition of fine in lieu of prosecution. The compounding provisions in an Act reflect the leniency in the administration of the Act. These provisions are explained as follows:

(i) Compoundable offences

Only the following offences can be compounded under this section:

1. Offences punishable with fine.
2. Offence punishable with fine or imprisonment or both.

As can be seen, following offences cannot be compounded:

1. Offences punishable with imprisonment.
2. Offences punishable with imprisonment and fine.

(ii) Time for applying for compounding of offences

An application for compounding of an offence may be made either before or after the institution of any prosecution, i.e. the application may be made even during the prosecution.

(iii) Authorities for compounding

An offence committed under this Act shall be compounded by the Securities Appellate Tribunal or the Court before which such proceedings are pending.

The provisions of Section 24A shall apply not withstanding anything contained in the code of Criminal Procedure, 1973.

Question 18.

(a) Priya Ltd., (hereinafter referred to as 'Seller'), manufacturer of footwears entered into an agreement with Metro Traders (hereinafter referred to as 'Purchaser'), for the sale of its products. The agreement includes, among others, the following clauses:

(i) That the Purchaser shall not deal with goods, products, articles, by whatever name called, manufactured by any person other than the Seller.

(ii) That the Purchaser shall not sell the goods manufactured by the Seller outside the municipal limits of the city of Secunderabad.

(iii) That the Purchaser shall sell the goods manufactured by the Seller at the price as embossed on the price label of the footwear. However, the purchaser is allowed to sale the footwear at prices lower than those embossed on the price label.

You are required to examine with relevant provisions of the Competition Act 2002, the validity of the above clauses.

Answer:

Section 3(1) prohibits entering 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. Any such agreement, if made, shall be void.

The following agreements shall be deemed to be prohibited under section 3(1), if such agreements cause or are likely to cause an appreciable adverse effect on competition:

(i) Tie-in arrangement, i.e., an agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods.

(ii) Exclusive supply agreement, i.e., an agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person.

(iii) Exclusive distribution agreement, i.e., an agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods.

(iv) Refusal to deal, i.e., an agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought.

(v) Resale price maintenance, i.e., an agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

The answers to the given problems are given hereunder:

(i) The Purchaser is prohibited from dealing with goods, products, articles, by whatever name called manufactured by any person other than the Seller. This clause falls under 'exclusive supply agreement' and is deemed to be prohibited under section 3(1), if it causes or is likely to cause an appreciable adverse effect on competition.

(ii) The Purchaser is prohibited from selling the goods manufactured by the Seller outside the municipal limits of the city of Secunderabad. This clause falls under 'exclusive distribution agreement' and is deemed to be prohibited under section 3(1), if it causes or is likely to cause an appreciable adverse effect on competition.

(iii) The Purchaser has been directed by the seller to sell the goods manufactured by the Seller at the price as embossed on the price label of the footwear, or at a price lower than what is embossed on the price label. Since the agreement clearly states that the prices lower than the price stipulated by the Seller can be charged, the agreement does not fall under the clause 'resale price maintenance', and therefore valid.

(b) The Competition Commission of India has received a complaint that M/s. Sadhu company has been abusing its dominant position in the food processing industry. Explain briefly the factors that will be considered by the commission to ascertain whether M/s. Sadhu company enjoys a dominant position in the industry.

Answer:

As per section 19, the Competition Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:

(i) market share of the enterprise;
(ii) size and resources of the enterprise;
(iii) size and importance of the competitors;
(iv) economic power of the enterprise including commercial advantages over competitors;
(v) vertical integration of the enterprises or sale or service network of such enterprises;
(vi) dependence of consumers on the enterprise;
(vii) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;
(viii) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;
(ix) countervailing buying power;
(x) market structure and size of market;

(xi) social obligations and social costs;

(xii) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have appreciable adverse effect on competition;

(xiii) any other factor which the Commission may consider relevant for the inquiry.

(c) Explain the meaning of the following terms :

(i) 'Tie-in arrangement'

(ii) 'Exclusive supply agreement'

(iii) 'Exclusive distribution agreement'

(iv) 'Refusal to deal'

(v) 'Resale price maintenance'

(vi) 'Bid rigging'

Answer:

(i) 'Tie-in arrangement' includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

(ii) 'Exclusive supply agreement' includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;

(iii) 'Exclusive distribution agreement' includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;

(iv) 'Refusal to deal' includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;

(v) 'Resale price maintenance' includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged;

(vi) 'Bid rigging' means any agreement, between enterprises or persons engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

Question 19.

(a) The Board of Directors of Vantur Ltd., a banking company incorporated in India, for the

accounting year ended 31-3-2010 transferred 15% of its net profit to its Reserve Fund. Certain shareholder of the company objects to the above act of the Board of Directors on the ground that it is violative of the provisions of the Banking Regulation Act, 1949. Examine the provision of Banking Regulation Act, 1949 and decide:

(i) Whether contention of the Shareholders is tenable.

(ii) Would your answer be still the same in case the Board of Directors transfer 30% of the company's net profits to Reserve Fund.

The Board of directors of Shivam Limited, a banking company incorporated in India, for the accounting period ended 31-03-2013 transferred 15% of its net profit to its Reserve Fund. Certain shareholders of the company object to the above act of the board on the ground that it is violative of the provisions of the Banking Regulation Act, 1949. Decide whether the contention of the shareholders is tenable under the Banking Regulation Act, 1949.

Answer:

As per section 17, every banking company shall transfer to the reserve fund a sum equivalent to not less than 20% of profit.

However, the Central Government may, on the recommendation of the Reserve Bank and having regard to the adequacy of the paid-up capital and reserves of a banking company in relation to its deposit liabilities, declare by order in writing that the requirement of transfer of at least 20% of profits to reserve fund shall not apply to a banking company for such period as may be specified in the order. But, no such order shall be made unless the amount in the reserve fund together with the amount in the share premium account is not less than the paid-up capital of the banking company.

The given problem is answered as under:

(i) The Board of directors of the banking company has transferred to reserves 15% of net profits. The shareholders have objected to it.
The objection made by the shareholders is valid since the minimum amount to be transferred to the reserve fund is 20% of profits.
However, the action of the Board shall be valid if the banking company has obtained in writing, an order of the Central Government, waiving compliance with the requirements of transfer to the reserve fund.

(ii) In case the Board has transferred to the reserves 30% of net profits, such decision shall be valid since the requirement of 20% of profits to be transferred to reserves is the minimum requirement given under the Act. The Board is free to transfer to reserves anything over and above 20% of net profits.

(b) What offences are triable by the Special Courts as per Prevention of Money Laundering Act, 2002?

Answer:

The provisions relating to offences triable by the Special Courts are contained in section 44 of the Prevention of Money Laundering Act, 2002 as explained below:

(i) Trial of offences by the Special Court having jurisdiction

1. Notwithstanding anything contained in the Code of Criminal Procedure, 1973 an offence punishable under section 4 and any scheduled offence connected to the offence under that section shall be triable by the Special Court constituted for the area in which the offence has been committed.
   Provided that the Special Court, trying a scheduled offence before the commencement of this Act, shall continue to try such scheduled offence.

2. Notwithstanding anything contained in the Code of Criminal Procedure, 1973 a Special Court may, upon a complaint made by an authority authorised in this behalf under this Act, take cognizance of offence under section 3, without the accused being committed to it for trial.

3. Notwithstanding anything contained in the Code of Criminal Procedure, 1973 if the court which has taken cognizance of the scheduled offence is other than the Special Court which has taken cognizance of the complaint of the offence of money-laundering under sub-clause (2), it shall, on an application by the authority authorised to file a complaint under this Act, commit the case relating to the scheduled offence to the Special Court and the Special Court shall, on receipt of such case proceed to deal with it from the stage at which it is committed.

4. Notwithstanding anything contained in the Code of Criminal Procedure, 1973 a Special Court while trying the scheduled offence or the offence of money laundering shall hold trial in accordance with the provisions of the Code of Criminal Procedure, 1973, as it applies to a trial before a Court of Session.

(ii) Power of the Special Court to grant bail

1. Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under section 439 of the Code of Criminal Procedure, 1973.

2. The High Court may exercise such powers including the power under clause (b) of sub-section (1) of section 439 as if the reference to 'Magistrate' in that section includes also a reference to a 'Special Court' designated under section 43.

Question 20.

(a) Explain the restrictions, if any, under Foreign Exchange Management Act, 1999 in respect

of the following issue and transfer of shares:

(i) Issue of equity shares of ₹ 1 crore at face value accounting for 45 percent of post-issue capital to non-resident Indians in U.S.A. on non- repatriation basis. The shares are issued by M/s Super Knitwear Limited to finance the modernisation of its plant.

(ii) A non-resident Indian, who is holding equity shares in M/s Delphi Textiles Limited, proposes to sell some shares to another non-resident Indian for a consideration of ₹ 50 lakhs and also transfer shares of face value of ₹ 25 lakhs to a person resident in India by way of gift.

Answer:

Capital account transaction means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India. It also includes transfer or issue of any security by a person resident outside India.

In general, a capital account transaction is not permissible, unless otherwise provided in the Act, rules or regulations made thereunder, or with the general or special permission of Reserve Bank of India.

(i) In the given case an Indian company, M/s Super Knitwear Limited, proposes to issue equity snares of ₹ 1 crore at face value accounting for 45 percent of post-issue capital to non-resident Indians in U.S.A. on non - repatriation basis. It is a capital account transaction. Therefore, this transaction shall be permissible in accordance with the regulations framed in this behalf, i.e., Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000. The said Regulations impose restrictions on a person resident outside India from purchasing or transferring securities of an Indian company. However, Regulation 5 of these regulations read with Clause (2) of Schedule IV permits a non-resident to purchase without any limit, the shares or debentures of an Indian company provided such purchase is on non-repatriation basis.

Therefore, in the instant case, the issue of equity shares of ₹ 1 crore at face value accounting for 45 percent of post-issue capital to non-resident Indians in U.S.A. on non-repatriation basis is permissible under FEMA.

(ii) In the given case a person resident outside India proposes to sell shares to another person resident outside India, and to gift some shares to a person resident in India. Both of these transactions are capital account transactions. Therefore, these transaction shall be permissible in accordance with the regulations framed in this behalf, i.e., Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000. The said Regulations permit a non resident Indian to

1. sell the shares or convertible debentures to another non-resident Indian;
2. transfer by way of gift any security held by him, to a person resident in India.

Therefore, in the instant case, the sale of equity shares by a non-resident Indian to another nonresident for a consideration of ₹ 50 lakhs, and gift of equity shares valued at ₹ 25 lakhs by a nonresident Indian to a person resident in India are permissible under FEMA.

(b) Mrs. Kamala, a resident in India is likely to inherit an immovable property in U.S.A. from her father, who is a resident outside India. Advise Mrs. Kamala about the restrictions, if any, in this regard under the Foreign Exchange Management Act, 1999 explaining the relevant provisions of the Act. Will your answer be different, if she is likely to inherit foreign securities?

Answer:

Capital account transaction means a transaction which alters the assets or liabilities, including contingent liabilities, outside India of persons resident in India or assets or liabilities in India of persons resident outside India [Section 2(e) read with Section 6].

As per section 6, a person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India.

Therefore, in the given case, there is no restriction on Mrs. Kamala when she inherits an immovable property in USA or foreign securities from her father who is a resident outside India.

(c) Radha Ltd., a securitisation or reconstruction company wants to takeover the management of Shyam Ltd. a borrower. Advice Radha Ltd., in line with SARFAESI Act, 2002.

Answer:

The manner of takeover of management and its effects are explained below:

(i) Notices in newspapers on takeover of management [Section 15(1)]

When the management of business of a borrower is taken over by a securitisation company or reconstruction company under clause (a) of section 9 or, as the case may be, by a secured creditor under clause (b) of sub-section (4) of section 13, it may, by publishing a notice in a newspaper published in English language and in a newspaper published in an Indian language in circulation in the place where the principal office of the borrower is situated, appoint as many persons as it thinks fit -

1. in a case in which the borrower is a company as defined in the Companies Act, 1956, to be the directors of that borrower in accordance with the provisions of that Act; or
2. in any other case, to be the administrator of the business of the borrower.

(ii) Consequences of publication of notices [Section 15(2)]

On publication of a notice under sub-section (1) -

1. in any case where the borrower is a company as defined in the Companies Act, 1956, all persons holding office as directors of the company and in any other case, all persons holding any office having power of superintendence, direction and control of the business of the borrower immediately before the publication of the notice under sub-section (1), shall be deemed to have vacated their offices as such;
2. any contract of management between the borrower and any director or manager thereof holding office as such immediately before publication of the notice under sub-section (1), shall be deemed to be terminated;
3. the directors or the administrators appointed under this section shall take such steps as may be necessary to take into their custody or under their control all the property, effects and actionable claims to which the business of the borrower is, or appears to be, entitled and all the property and effects of the business of the borrower shall be deemed to be in the custody of the directors or administrators, as the case may be, as from date of the publication of the notice;
4. the directors appointed under this section shall, for all purposes, be the directors of the company of the borrower and such directors or as the case may be, the administrators appointed under this section, shall alone be entitled to exercise all the powers of the directors or as the case may be, of the persons exercising powers of superintendence, direction and control, of the business of the borrower whether such powers are derived from the memorandum or articles of association of the company of the borrower or from any other source whatsoever.

(iii) Certain rights of shareholders suspended in case of takeover of management [Section 15(3)]

Where the management of the business of a borrower, being a company as defined in the Companies Act, 1956, is taken over by the secured creditor, then, notwithstanding anything contained in the said Act or in the memorandum or articles of association of such borrower -

1. it shall not be lawful for the shareholders of such company or any other person to nominate or appoint any person to be a director of the company;
2. no resolution passed at any meeting of the shareholders of such company shall be given effect to unless approved by the secured creditor;
3. no proceeding for the winding up of such company or for the appointment of a receiver in respect thereof shall lie in any court, except with the consent of the secured creditor.

(iv) Restoration of management on realisation of full debts [Section 15(4)]

Where the management of the business of a borrower had been taken over by the secured creditor, the secured creditor shall, on realisation of his debt in full, restore the management of the business of the borrower to him.

Question 21.

(a) Explain the provisions relating to establishment of Insurance Advisory Committee, as per IRDA Act, 1999.

Answer:

The provisions of section 25 relating to Establishment of Insurance Advisory Committee may be explained as follows:

(i) Establishment by the Authority [Section 25(1)]
The authority may, by notification, establish with effect from such date as it may specify in such notification, a Committee to be known as the Insurance Advisory Committee.

(ii) Number of members of the Insurance Advisory Committee [Section 25(2)]
The Insurance Advisory Committee shall consist of not more than 25 members excluding ex officio members to represent the interest of commerce, industry, transport, agriculture, consumer fora, surveyors, agents, intermediaries, organisations engaged in safety and loss prevention, research bodies and employees' association in the insurance sector.

(iii) Chairperson and members of the Insurance Advisory Committee [Section 25(3)]
The Chairperson and the members of the Authority shall be the ex officio Chairperson and ex officio members of the Insurance Advisory Committee.

(iv) Objects of the Insurance Advisory Committee [Section 25(4)]
The objects of the Insurance Advisory Committee shall be to advise the Authority on matters relating to the making of the regulations under section 26.

(v) Advise on other matters [Section 25(5)]
Without prejudice to the provisions of sub-section (4), the Insurance Advisory Committee may advise the Authority on such other matters as may be prescribed.

(b) Explain the provisions relating to meetings of the Authority of Insurance regulatory and development, as stated in IRDA Act, 1999.

Answer:

The provisions relating to the meetings of the Authority are explained as follows:

(i) Number of meetings and procedure for meetings [Section 10(1)]
The Authority shall meet at such times and places and shall observe such rules and procedures in regard to transaction of business at its meetings (including quorum at such meetings) as may be determined by regulations.

(ii) Effects of absence of Chairperson [Section 10(2)]
The Chairperson, or if for any reason he is unable to attend a meeting of the Authority, any other member chosen by the members present from amongst themselves at the meeting shall preside at the meeting.

(iii) Decisions by majority [Section 10(3)]
All questions which come up before any meeting of the Authority shall be decided by a majority of votes by the members present and voting, and in the event of an equality of votes, the Chairperson, or in his absence, the person presiding shall have a second or casting vote.

(iv) Regulations for transaction of business [Section 10(4)]
The Authority may make regulations for the transaction of business at its meetings.

(c) Explain the provisions of the Insurance Act, 1938 with respect to re-insurance with Indian re-insurers.

Answer:

The provisions of the Act with respect to re-insurance with Indian re-insurers are explained below:

(i) Mandatory for every insurer to re-insure with Indian re-insurers certain specified percentage of sum assured [Section 101A(1)]
Every insurer shall re-insure with Indian re-insurers such percentage of the sum assured on each policy as may be specified by the Authority, with the previous approval of the Central Government under subsection (2).

(ii) Percentage of sum assured to be re-insured to be specified by the Authority [Section 101A(2)]
For the purposes of sub-section (1), the Authority may, by notification in the Official Gazette, specify the percentage of the sum assured on each policy to be re-insured and different percentages may be specified for different classes of insurance.
However, no percentage so specified shall exceed 30% of the sum assured on such policy.

(iii) Mandatory to consult Advisory Committee before issue of notification [Section 101A(5)]
No notification under sub-section (2) shall be issued except after consultation with the Advisory Committee.

(iv) Option of insurer to re-insure a higher percentage of sum assured [Section 101 A(7)]
For the removal of doubts, it is hereby declared that nothing in sub-section (1) shall be construed as preventing an insurer from re-insuring the entire sum assured on any policy or any portion thereof in excess of the percentage specified under sub-section (2).

Question 22.

(a) What are the qualifications required for appointment as Chairperson and Member of Appellate Tribunal, as per Electricity Act, 2003. What would be their term of office?

Answer:

Qualifications for appointment of Chairperson and Member of Appellate Tribunal, as per Electricity Act, 2003 —

(1) A person shall not be qualified for appointment as the Chairperson of the Appellate Tribunal or a Member of the Appellate Tribunal unless he —

(i) in the case of the Chairperson of the Appellate Tribunal, is, or has been, a Judge of the Supreme Court or the Chief Justice of a High Court; and

(ii) in the case of a Member of the Appellate Tribunal,—

1. is, or has been, or is qualified to be, a Judge of a High Court; or
2. is, or has been, a Secretary for at least one year in the Ministry or Department of the Central Government dealing with economic affairs or matters or infrastructure; or
3. is, or has been, a person of ability and standing, having adequate knowledge or experience in dealing with the matters relating to electricity generation, transmission and distribution and regulation or economics, commerce, law or management.

(2) The Chairperson of the Appellate Tribunal shall be appointed by the Central Government after consultation with the Chief Justice of India.

(3) The Members of the Appellate Tribunal shall be appointed by the Central Government on the recommendation of the Selection Committee referred to in section 78.

(4) Before appointing any person for appointment as Chairperson or other Member of the Appellate Tribunal, the Central Government shall satisfy itself that such person does not have any financial or other interest which is likely to affect prejudicially his functions as such Chairperson or Member.

Section 113, of Electricity Act, provides for qualification of Chairperson and Members of Appellate Tribunal. It provides that a person shall not be qualified for appointment as Chairperson of Appellate Tribunal unless he is or has been a Judge of the Supreme Court or Chief Justice of a High Court. It further provides, inter alia, that the Members of the Appellate Tribunal shall be appointed by the Central Government on the recommendation of the Selection Committee referred to in section 78.

Term of office (Section 114 of Electricity Act, 2003) —The Chairperson of the Appellate Tribunal or a Member of the Appellate Tribunal shall hold office as such for a term of three years from

the date on which he enters upon his office:

Provided that such Chairperson or other Member shall be eligible for reappointment for a second term of three years:

Provided further that no Chairperson of the Appellate Tribunal or Member of the Appellate Tribunal shall hold office as such after he has attained,—

(i) in the case of the Chairperson of the Appellate Tribunal, the age of seventy years;
(ii) in the case of a Member of the Appellate Tribunal, the age of sixty-five years.

Section 114 provides for the terms of office of Chairperson and the Members of Appellate Tribunal. It provides the term of three years with a further provision of re-appointment for a second term of three years. No Chairperson of Appellate Tribunal shall hold office if he has attained the age of seventy years and a Member shall hold office after he has attained the age of sixty five years.

(b) What are the functions of the Central Electricity Regulatory Commission.

Answer:

The Central Electricity Regulatory Commission (deemed to be the Central Commission for the purposes of this Act) shall discharge the following functions, namely:—

(a) to regulate the tariff of generating companies owned or controlled by the Central Government;
(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;
(c) to regulate the inter-State transmission of electricity;
(d) to determine tariff for inter-State transmission of electricity;
(e) to issue licences to persons to function as transmission licensee and electricity trader with respect to their inter-State operations;
(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;
(g) to levy fees for the purposes of this Act;
(h) to specify Grid Code having regard to Grid Standards;
(i) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees;
(j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;
(k) to discharge such other functions as may be assigned under this Act.

(2) The Central Commission shall advise the Central Government on all or any of the following matters, namely:—

(i) formulation of National Electricity Policy and tariff policy;
(ii) promotion of competition, efficiency and economy in activities of the electricity industry;
(iii) promotion of investment in electricity industry;
(iv) any other matter referred to the Central Commission by that Government.

(3) The Central Commission shall ensure transparency while exercising its powers and discharging its functions.

(4) In discharge of its functions, the Central Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3.

Question 23:

(a) Describe the role of stock exchange in Corporate Governance.

Answer:

Stock exchanges have established themselves as promoters of corporate governance recommendations for listed companies. Demutualisation and the subsequent self-listing of exchanges have spurred debate on the role of exchanges. The conversion of exchanges to listed companies is thought to have intensified competition. And, the sharper competition has forced the question of whether there is a risk of a regulatory "race to the bottom".

Also exchanges are uneasy about the prospect of having to continue performing their traditional regulatory and other corporate governance enhancing functions amid a shrinking revenue base. Therefore extension of role and wider responsibility are always welcome.

Following points show relevance of role of Stock Exchanges in the Corporate Governance:

1. Stock exchanges in the region developing rapidly; new exchanges being established
2. Stock exchanges remain government owned entities
3. CG codes proliferating, some no longer voluntary
4. Regulatory or enforcement powers of exchanges limited
5. Room for strengthening of listing rules
6. Disclosure of listed companies requires further attention
7. No evidence of race to the bottom, need to align with industry peers

The traditional role of exchanges in corporate governance

Historically, the main direct contribution of exchanges to corporate governance has been listing and disclosure standards and monitoring compliance. The regulatory function of stock exchanges was in the past mostly limited to issuing rules and clarifying aspects of existing frameworks. The standard-setting role of stock exchanges was essentially exercised through the issuance of listing, ongoing disclosure, maintenance and de-listing requirements. On the enforcement side, stock exchanges have shared their regulatory function with capital market supervisory agencies. In addition to overseeing their own rules, stock exchanges were assigned the role of monitoring the compliance with legislation and subsidiary securities regulation. Since the promulgation of the SEBI, stock exchanges have often enlarged their regulatory role to embrace a wider palette of corporate governance concerns. They have contributed to the development of corporate governance recommendations and encouraged their application to listed companies. The objective of the following part of the article is to summarize these key channels for exchanges' contributions to good corporate governance in listed companies.

The evolving role of exchanges in respect of corporate governance

a) Exchanges act as a source of corporate governance related regulation:

Exchanges provide complementary rationales for establishing themselves as a source of corporate governance - related regulations. In essence, by raising transparency and discouraging illegal or irregular practices, exchanges are act as regulatory authorities. The regulatory function of exchanges is exercised in the context of an existing legal framework.

Exchanges' ability to introduce and enforce regulations is obviously circumscribed by the authority of the relevant market regulators. To the extent that the relevant laws or securities regulation already address corporate governance of listed companies, the role of exchange regulation can therefore only be complementary. For instance, rules on prospectus issuance follow largely from SEBI Prospectus Directive which may have further limited the scope of standards setting by exchanges. Even in jurisdictions where exchanges are empowered to issue regulations, they may be subject to an approval by another regulatory authority, e.g., in the India, proposed changes to exchange rules must be filed with the SEBI.

b) Exchanges played a central role in the effective implementation of national corporate governance codes

"Corporate Governance is concerned with holding the balance between economic and social goals and between individual and communal goals. The corporate governance framework is there to encourage the efficient use of resources and equally to require accountability for the stewardship of those resources. The aim is to align as nearly as possible the interests of individuals, corporations and society." One of the first among such endeavours was the CII Code for Desirable Corporate Governance developed by a committee chaired by Rahul Bajaj. The committee was formed in 1996 and submitted its code in April 1998. Later SEBI constituted two committees to look into the issue of corporate governance – the first chaired by Kumar Mangalam Birla that submitted its report in early 2000 and the second by Narayana Murthy three years later. The SEBI committee recommendations have had the maximum impact on changing the corporate governance situation in India. The Narayana

Murthy committee worked on further refining the rules. The Exchange has brought about unparalleled transparency, speed & efficiency, safety and market integrity. It has set up facilities that serve as a model for the securities industry in terms of systems, practices and procedures.

c) Compliance requirements

Listed companies have to comply with rules and regulations of concerned stock exchange and work under the vigilance (i.e.supervision) of stock exchange authorities. Clause 49 of the listing agreement with stock exchanges provides the code of corporate governance prescribed by SEBI for listed Indian companies. With the introduction of clause 49, compliance with its requirements is mandatory for such companies. Exchanges have played a pioneering role in the development of the Indian securities market.

d) Awareness raising efforts have also played a role

Some exchanges have been actively involved in increasing the awareness around the value of good corporate governance. For instance, The National Stock Exchange (NSE) a leading stock exchange covering various cities and towns across the country has established & organized training sessions and other educational projects in order to increase the awareness of securities market & good governance practices and the Code of Best Practice for Listed Companies. Such programmes not only serve the general public but also require corporates to maintain good governance in light of investor awareness. In the same way an equally important accomplishment of BSE Limited is its nationwide investor awareness campaign - "Safe Investing in the Stock Market" under which awareness campaigns and dissemination of information through print and electronic medium is undertaken across the country. BSE Limited also actively promotes the securities market awareness campaign of the Securities and Exchange Board of India.

(b) CSR is an integral part of sustainable development. Explain

Answer:

CSR is an integral part of Sustainable Development (SD). Exactly where it fits in is vigorously debated, mainly because the concept of sustainable development also has many different interpretations.

The basic idea to incorporate the sustainability aspect into business management should be grounded in the ethical belief of give and take to maintain a successful company in the long -term. As the company is embedded in a complex system of interdependences in - and outside the firm, this maintaining character should be fulfilled due to the company's commitment in protecting the environment or reducing its ecological footprint and due to the general acceptance of its corporate behavior by society in and outside of the firm. It is recommended that CSR is to be used as social strand of the SD - concept which is mainly built

on a sound stakeholder approach. CSR focus especially on the corporate engagement realizing its responsibilities as a member of society and meeting the expectations of all stakeholders.

CSR advocates moving away from a 'shareholder alone' focus to a 'multi - stakeholder' focus. Sustainable Development is 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.

A business organisation which employs eco – friendly business practices is, no doubt, socially responsible as it takes into account the interest of its stakeholders, viz. the environment and the society at large. As a corollary, a business organisation which is socially responsible would, no doubt, employ eco - friendly business practices.

Only a business organisation which is conscious of its duty towards the environment, would employ eco - friendly business practices and adopt the principles of sustainable development.

Thus, it is correct to say that "Corporate Social Responsibility is closely linked with the principles of sustainable development".

(c) Discuss the sources of Ethical standards.

Answer:

Ethics is not entirely based on feelings, religion, law, accepted social practices, or science, as such. Many Philosophers and ethicists have suggested at least five different sourcesof ethical standards to be used.

The five sources of Ethical standards are –

Approach	Description
The Utilitarian Approach	• This is an approach based on consequences, ie good or harm • Thus, the most ethical corporate action, is the one that produces the greatest good and does the least harm for all who are affected – Customers, Employees, Shareholders, the community as a whole, and the environment
The Rights approach	• This approach is based on the belief that Humans have a dignity based on their human nature per se on their ability to choose freely that they do with their lives. • Hence, the best ethical action is one that best protects and respects the moral rights of those affected, ie Ethics involves the duty to respect other's rights
The Fairness or Justices approach	• This approach states that all equals should be treated equally. • This approach seeks to reduce imbalance of power, and to ensure

	that human beings are treated fairly based on some standard that is defensible. This concept is also discussed by the great philosopher Plato in his book "The Republic"
The Common Good Approach	• This approach suggests that inter-locking relationships of society are the basis of ethical reasoning and that respect and compassion for all others especially the vulnerable are requirements of such reasoning. • This approach calls attention to the common conditions that are important to the welfare of everyone. This may be a system of Laws, effective police and fire departments, health care, a public educational system, etc
The Virtue Approach	• This approach states that ethical actions ought to be consistent with certain ideal virtues that provide for the full development of our humanity. • These virtues are dispositions and habits that enable us to act according to the highest potential of our character and on behalf of values like truth and beauty. • Honesty, courage, compassion, generosity, tolerance, love, fidelity, integrity, fairness, self-control, and prudence are all examples of virtues.

Question 24:

(a) Why Corporate Governance is required in Banks?

Answer:

If we examine the need for improving corporate governance in banks, two reasons stand out: (i) Banks exist because they are willing to take on and manage risks. Besides, with the rapid pace of financial innovation and globalisation, the face of banking business is undergoing a sea-change. Banking business is becoming more complex and diversified. Risk taking and management in a less regulated competitive market will have to be done in such a way that investors' confidence is not eroded, (ii) Even in a regulated set-up, as it was in India prior to 1991, some big banks in the public sector and a few in the private sector had incurred substantial losses. This, along with the massive failures of non-banking financial Companies (NBFCs), had adversely impacted investors' confidence.

Moreover, protecting the interests of depositors becomes a matter of paramount importance to banks. In other corporates, this is not and need not be so for two reasons: (i) The depositors collectively entrust a very large sum of their hard-earned money to the care of banks. It is found that in India, the depositor's contribution was well over 15.5 times the shareholders' stake in banks as early as in March 2001. This is bound to be much more now. (ii) The depositors are very large in number and are scattered and have little say in the administration of banks. In other corporates, big lenders do exercise the right to direct the management. In any case,

the lenders' stake in them might not exceed 2 or 3 times the owners' stake.
Banks deal in people's funds and should, therefore, act as trustees of the depositors. A regulator the worlds over have recognised the vulnerability of depositors to the whims of managerial misadventures in banks and, therefore, have been regulating banks more tightly than other corporates.

To sum up, the objective of governance in banks should first be protection of depositors' interests and then be to "optimise" the shareholders' interests. All other considerations would fall in place once these two are achieved.

As part of its ongoing efforts to address supervisory issues, the Basel Committee on Banking Supervision (BCBS) has been active in drawing from the collective supervisory experience of its members and other supervisors in issuing supervisory guidance to foster safe and sound banking practices. The committee was set up to reinforce the importance for banks of the OECD principles, to draw attention to corporate governance issues addressed by previous committees, and to present some new topics related to corporate governance for banks and their supervisors to consider.

Banking supervision cannot function effectively if sound corporate governance is not in place and, consequently, banking supervisors have a strong interest in ensuring that there is effective corporate governance at every banking organisation. Supervisory experience underscores the necessity of having the appropriate levels of accountability and checks and balances within each bank. Put plainly, sound corporate governance makes the work of supervisors infinitely easier. Sound corporate governance can contribute to a collaborative working relationship between bank management and bank supervisors.

(b) What are the pros and cons of adopting Corporate Social Responsibility?

Answer:

Corporate social responsibility refers to a method of running a company that seeks to address not only profitability, but also the environmental and social consequences of the business. While most corporate social responsibility concerns are directed at very large businesses, even small and medium-sized businesses that employ a large number of local residents or participate in environmentally problematic industries can face pressure to adopt corporate social responsibility.

Costs - Cons
Cost represents one of the biggest arguments against adopting corporate social responsibility as a policy. Programs to reduce environmental impact often require expensive changes in equipment or ongoing costs without any clear way to recoup those losses. The decision to maintain domestic production facilities or call centers or to buy from domestic producers rather than outsource or move production overseas can drive up costs for a business. Additionally, there is no clear evidence that adhering to a policy of corporate social

responsibility generates a significant increase in sales or profit.

Improved Company Reputation - Pros

Embracing a policy of corporate social responsibility, paired with genuine action, can serve to build or improve the reputation of a business. If a company's behavior creates a negative backlash that leads to lost profitability -over environmental issues, for example --corporate social responsibility becomes a method to repair reputation damage and restore profitability. In other cases, adopting such a policy works as part of a business" essential brand, and consumers often demonstrate more loyalty to brands that can demonstrate a commitment to environmental concerns.

Shareholder Resistance - Cons

Some investors do look to acquire stock in socially responsible corporations, but, on the whole, investors purchase stock on the expectations of turning a profit. While some companies, such as Toyota and GE, have profited from corporate social responsibility, companies that adopt such policies often prove as likely to lose money. Given the spotty track record of corporate social responsibility in demonstrating profit increase, investors may resist attempts by executives to move a company in that direction.

Better Customer Relations - Pros

One of the hallmarks of corporate social responsibility is staying involved in the communities where the business operates. This community involvement goes a long way toward building trust between customers and the business. If a business builds trust with its customers, they tend to give the business the benefit of the doubt if something goes wrong, rather than assuming malicious intent or raw negligence. Customers also tend to stick with businesses they trust, rather than actively seeking out new companies, which helps keep a business profitable over the long haul.

Question 25:

(a) How would you classify "Workplace Ethical Issues"

Answer:

Ethical issues in workplace can be categorized in the following framework –

(i) Relationship with Business associates
(ii) Conflict of interests
(iii) Fairness and honesty
(iv) Communications

They may be explained as follows:

(i) Relationship with Business associates

1. Ethical behavior in business involves – (a) Keeping company's secrets, (b) meeting obligations and responsibilities and (c) avoiding undue pressure that may force others to act unethically.
2. The behavior of business enterprise towards customers, suppliers and others in their workplace may generate ethical concerns. For example, a company will benefit more by treating its customers fairly and equitably. Customers should also perceive that they are being treated fairly by the company.
3. Due to their positional authority, Managers can influence employee's actions. Employees may be forced to engage in activities that they might personally view as unethical, eg invading other's privacy or stealing a competitors secrets

(ii) Conflicts of Interest

1. A conflict of interest exists when a person must choose whether to advance his or her own personal interest or those of the organizations.
2. Conflicts of interest need not always be financial. However, the effect of a decision taken in a "conflict of interest" situation has a financial impact to the company.
3. To avoid conflicts of interest, Employees must be able to separate their personal financial interest from their business dealings.

(iii) Fairness and Honesty

1. Fairness and honesty are at the heart of business ethics and relate to the general values of decision makers.
2. Business enterprises are expected to – (a) follow all applicable laws and regulations and (b) avoid harming customers, employees, clients, or competitors knowingly through deception, misrepresentation, coercion or discrimination.
3. Some aspects of fairness and honesty are – (a) disclosure of negative side-effects or potential harm caused by product use, and (b) avoiding illegal and questionable monopolistic practices to stifle competition.

(iv) Communications

1. False and misleading advertising, as well as deceptive personal – selling tactics, that anger consumers can lead to the failure of business. Hence, communication is a key area in which ethical concerns may arise
2. Truthful disclosures on product safety and quality are important to consumers, eg in case of food items, medicines, etc. Communication of product safety, quality and effectiveness claims to consumers should be truthful and complete.
3. Product labeling is another important aspect of communication that may raise ethical concern. For example, it is mandatory for cigarette manufacturers to indicate clearly on cigarette packing that smoking cigarettes is harmful to the smoker's health.

(b) Why whole life risk monitoring is essential for ensuring effective implementation of risk control measures?

Answer:

Whole life risk monitoring and feedback

The issue of risk monitoring is essential for ensuring effective implementation of risk control measures. Active risk monitoring ensures that effective response measures to manage the risks are appropriately implemented. Since we are dealing with the life - cycle of projects, the initial decision conditions may change over - time, which could lead to the change of risks. Hence, a feedback and continuous assessment of risk through the entire life span of the project is very important in the process of whole life - cycle costing. This process should include tracking the effectiveness of the planned risk responses, reviewing any changes in priority of response management, monitoring the state of the risks, updating the whole life - cycle analysis accordingly and reviewing the economic performance indicators to check whether the investment decision is still valid or otherwise. In this way risk monitoring not only evaluates the performance of risk response strategies but also serves as a continuing feedback or audit mechanism.

The application of the above framework should take place during the early stages of asset development as well as at every project milestone, and should continue throughout the whole life of the asset. The information generated from the WLCC risk management framework should inform decision makers on which input data has the most impact on the WLCC result and how robust the final decisions are

Question 26:

(a) Enumerate the principles of corporate Governance as evolved by OECD?

Answer:

The Organisation for Economic Co-operation and Development (OECD) was one of the earliest non - governmental organisations to work on and spell out principles and practices that should govern corporates in their goal to attain long term shareholder value. They include the following elements:

The rights of shareholders: The rights of shareholders include a set of rights to secure ownership of their shares, the right to full disclosure of information, voting rights, participation in decisions on sale or modification for corporate assets, mergers and new share issues. The guidelines go on to specify a host of other issues connected to the basic concern of protecting the value of the corporation.

Equitable treatment of shareholders: The OECD is concerned with protecting minority shareholders' rights by setting up systems that keep insiders, including managers and directors, from taking advantage of their roles. Insider trading, for example, is explicitly prohibited and directors should disclose any material interest regarding transactions.

The role of stakeholders in corporate governance: The OECD recognizes that there are other stakeholders in companies in addition to shareholders and workers, for example, are important stakeholders in the way in which companies perform and make decisions. The OECD guidelines lay out several general provisions for protecting stakeholder's interests.

Disclosure and transparency: The OECD lays down a number of provisions for the disclosure and communication of key facts about the company ranging from financial details to governance structures including the board of directors and their remuneration.
The guidelines also specify that independent auditors in accordance with high quality standards should perform annual audits.

The responsibilities of the board: The OECD guidelines provide a great deal of details about the functions of the board in protecting the company and its shareholders. These include concerns about corporate strategy, risk, executive compensation and performance as well as accounting and reporting systems.

(b) What is meant by the corporate governance as per renowned exponents in this field? How far do you agree with their views?

Answer:

Corporate governance is...
• The process of supervision and control intended to ensure that the company's management acts in accordance with the interests of shareholders (Parkinson, 1994). - Strongly agree

•The governance role is not concerned with the running of the business of the company per se, but with giving overall direction to the enterprise, with overseeing and controlling the executive actions of management and with satisfying legitimate expectations of accountability and regulation by interests beyond the corporate boundaries (Tricker, 1984). - Agree

• The governance of an enterprise is the sum of those activities that make up the internal regulation of the business in compliance with the obligations placed on the firm by legislation, ownership trusteeship of assets, their management and their deployment (cannon, 1994). – Agree

• The relationship between shareholders and their companies and the way in which shareholders act to encourage best practice (e.g., by voting at AMs and by regular meetings with companies senior management). Increasingly, this includes shareholder activism'which involves a campaign by a shareholder or a group of shareholders to achieve change in companies (the Corporate Governance Handbook, 1996). - Some agreement

• The structures, process, cultures and systems that engender the successful operation of the Organization (Keasey and Wright, 1993). - Some agreement

• The system by which companies are directed and controlled (The Cadbury Report, 1992) - slight agreement.

(c) As per the revised corporate governance code published in Japan in 2001, discuss the mission and role of (i) Board of Directors and (ii) Committees established within the board.

Answer:

Mission and role of the board of directors

This first chapter contained five principles relating to: the position and purpose of the board of directors; the function and powers of the board of directors; the organization of the board of directors; outside directors and their independence; the role of the leader of the board of directors.

The board should be comprised of outside directors (someone who has never been a full - time director, executive, or employee of the company) - preferably a majority - and inside directors (executives or employees of the company). Independent directors are outside directors who can make their decisions independently. The board of directors' role is seen as one of management supervision including approving important strategic decisions, nominating candidates for director positions, appointment and removal of the CEO, and general oversight of accounting and auditing, the board of directors may also be required to approve certain decisions made by the CEO.

Mission and role of the committees established within the board of directors

The board is recommended to establish various committees including an audit committee, compensation committee, and nominating committee. Each committee established should comprise at least three directors, and an outside director appointed as chair of each committee. The majority of directors on the audit committee should be independent directors, whilst the majority of directors on the audit committee should be independent directors, whilst the majority of directors on the other two committees should be outside directors, of whom at least one should be an independent director. The roles of the various

committees are broadly defined and cover the usual areas that one would expect for each of these committees.

Question 27:

(a) Explain the role of subjectivity in WLCC.

Answer:

Subjectivity in WLCC

The issue of subjectivity and vagueness is also a very important facet of WLCC. Subjectiveness, vagueness and ambiguity (used interchangeably) are different from randomness. Randomness deals with uncertainty (In terms of probability) concerning occurrence or non - occurrence of an event. Subjectivity, on the other hand, has to do with the imprecision and inexactness of events and judgments including probability judgments.
Many WLCC decision problems involve variables and relationships that are difficult, if not possible, to measure precisely. For example, probability judgments about issues like inflation, operation costs, etc. are not always precise in WLCC and often cost analysts use subjective expression to express their probability judgments. This applies to probability judgments as well as the costs and benefits in many WLCC decision problems. The requirement for high levels of precision may cause WLCC models to lose part of their relevance to the real world by ignoring some of the relevant decision attributes because these variables are in capable of precise measurement or because their inclusion may increase the complexity of the models. Hence, the key to successful WLCC and risk assessment is to build models that require little information - no more than the users can provide.

(b) "The development of corporate Governance in the U. K. was initially the findings of a trilogy of codes". Discuss in brief.

Answer:

As in other countries, the development of Corporate Governance in the UK was initially the findings of a trilogy of codes: the Cadbury Report (1992), the Greenbury Report (1995), and the Hampel Report (1998). The recommendations of these reports, which helped in development of corporate governance in U.K. are explained as under:

Cadbury Report (1992)

The recommendations covered: the operation of the main board; the establishment, composition, and operation of key board committees; the importance of, and contribution that can be made by, non - executive directors; the reporting and control mechanisms of a business. The Cadbury Report recommended a code of Best Practice with which the boards

of all listed companies registered in the UK should comply, and utilized a — comply or explain mechanism. This mechanism means that a company should comply with the code but, if it cannot comply with any particular aspect of it, then it should explain why it is unable to do so. This disclosure gives investors' detailed information about any instances of non - compliance and enables them to decide whether the company's non - compliance is justified.

Greenbury Report (1995)

Central to the Greenbury report recommendations were strengthening accountability and enhancing the performance of directors. These two aims were to be achieved by (i) the presence of a remuneration committee comprised of independent non - executive directors who would report fully to the shareholders each year about the company's executive remuneration policy, including full disclosure of the elements in the remuneration of individual directors; and (ii) the adoption of performance measures linking rewards to the performance of both the company and individual directors, so that the interests of directors and shareholders were more closely aligned. Since that time (1995), disclosure of directors' remuneration has become quite prolific in UK company accounts.

Hampel Report (1998)

The Hampel Report, like its precursors, also emphasized the important role that institutional investors have to play in the companies in which they invest (investee companies). It is highly desirable that companies and institutional investors engage in dialogue and that institutional investors make considered use of their shares, in other words, institutional investors should consider carefully the resolutions on which they have a right to vote and reach a decision based on careful thought, rather than engage in box ticking'

(c) List out the key features of the Kumar Mangalam Birla Committee's Report on Corporate Governance.

Answer:

The Kumar Mangalam Birla Committee Report, the key features are:

- Strengthening of disclosure norms for initial public offer
- Providing information in Director's report for utilisation of funds
- Declaration of quarterly results
- Mandatory appointment of Compliance Officer
- Disclosure of material and price- sensitive information
- Disclosure of material events
- Copy of abridged balance sheet to all shareholders
- Guidelines for preferential allotment
- Regulation for fair and transparent framework for takeovers and substantial acquisition
- Audit committee

- Frequency of meetings and quorum
- Independent, and Nominee Directors in the Board

Question 28:

(a) Write a short note on WLCC.

Answer:

Whole Life Cycle - In practice, we refer to WLC as the total operating costs of the building, including energy/utilities costs and facilities management elements that relate to the building, such as maintenance and cleaning. LCC refers to replacement building components within the building such as windows fan coil units etc. Over and above these are facilities management costs, such as security and catering.

Role of whole life cycle costing

Combined with WLCC, risk assessment should form a major element in the strategic decision making process during project procurement and also in value analysis, especially in today's highly uncertain business environment. WLCC decisions are complex (the complexity level is usually determined by the scale, funding and financial environment surrounding the scheme amongst other factors), and usually comprise an array of significant factors affecting the ultimate cost decisions. WLCC decisions generally have multiple objectives and alternatives, long term impacts, multiple constituencies in the procurement of construction project, generally involve multiple disciplines and a numerous decision makers, and always involve various degrees of risk and uncertainty. Project cost, design and operational decision parameters are often established very early in the life of a given building project often these parameters are chosen based on owner's and project team's personal experiences or on an adhoc static economic analysis of the anticipated project costs. While these approaches are common they do not provide a robust framework for dealing with the risk and decision that are taken in the evaluation process. Nor do they allow for a systematic evaluation of all the parameters impact of many quantitative and qualitative parameters.

Capital costs and future costs must be quantified analysed and present as part of the strategic decision making process in today's business environment cost analysis and value analysis techniques are used to quantity and assess the economic implications of investment in building facilities in general. These techniques have typically concentrated on utilizing life cycle and comparative cost procedures to determine either the lowest initial cost alternative or the highest investment return alternative while these techniques do provide a basis for making project cost decision, they most often do not account for many of the parameters which may affect the actual project value of cost. The existing methods also do not use formal decision making processes and risk assessment methods in performing cost benefit analysis.

(b) What are the important legislations that govern corporate governance in India?

Answer:

The following are some of the important legislations that govern corporate governance:

The Companies Act, 2013

The Companies Act, 2013 is the principal legislation that governs the companies. Its objectives are:

- Standard of business integrity
- Conduct in the promotion and management of companies
- Disclosure of all reasonable information relating to the affairs of the company
- Effective participation
- Shareholders and their protection of interest
- Performance and management
- Governance

The Competition Act, 2002

The objectives of the Competition Act, 2002 include:

- Prohibition of anti-competitive agreements
- Prohibition of abuse of dominant position
- Regulation of combination.

The Securities and Exchange Board of India (SEBI) Act, 1992

SEBI has been instituted by the Securities and Exchange Board of India Act, 1992 with the following objectives:

- Protect the interests of investors or securities
- Promote the development of the securities market
- Regulate the securities market
- Investors' education
- Regulation of intermediaries
- Protect investors against unfair and fraudulent trade practices
- Provide a grievance redressal mechanism

The Foreign Exchange Management Act (FEMA), 1999

The Foreign Exchange Management Act, 1999 came into effect on June 1, 2000 and it replaced the Foreign Exchange Regulation Act (FERA), 1973. While the objective of FERA was

to conserve the foreign exchange resources, FEMA facilitated external trade and payments and promoted orderly maintenance of the foreign exchange market in India. The highlights of the new Act are given below:

(i) FEMA is more transparent in its application. It has laid down the areas where specific permission of the Reserve Bank/Government of India is required. A person can, thus, remit funds, acquire assets, and incur liability in accordance with the specific provisions laid down in the Act or the notifications issued by the Reserve Bank/Government of India under the Act without seeking approval of Reserve Bank/ Government of India.

(ii) Application of FEMA may be seen broadly from two angles: (i) capital account transactions and (ii) current account transactions, capital account transactions will be regulated by the Reserve Bank and they relate to movement of capital, e.g. transactions in property and investments, and lending and borrowing money. Current account transactions are those which do not fall in the capital account category. They which are permitted freely subject to a few restrictions as given below:

1. RBI permission would be required when they exceed a certain ceiling.

2. Need permission of Government of India appropriate authority irrespective of the amount.

3. There are seven types of current account transactions which are prohibited and no transaction can, therefore, be undertaken relating to them. These include transactions relating to lotteries, football pools, and banned magazines.

Significant features:

The Foreign Exchange Management Act and Rules give full freedom to a person resident in India who was earlier resident outside India to hold or own or transfer any foreign security, shares or immovable property situated outside India and acquired when he/she was resident there. Similar freedom is also given to a resident who inherits such security or immovable property from a person resident outside India. The exchange drawn can also be used for purposes other than for which it is drawn provided drawal of exchange is otherwise permitted for such purpose. Certain prescribed limits have been substantially enhanced.

The Foreign Contribution (Regulation) Act, 1976

The foreign contribution (Regulation) Act, 1976 has been brought in to regulate the acceptance and utilisation of foreign contribution or foreign hospitality by certain persons or associations. The purpose of the regulation is to ensure that parliamentary institutions, political associations, academic and other voluntary organisations as well as individuals working in the important areas of national life function in a manner consistent with the values of the Sovereign Democratic Republic. The Act extends to the whole of India, in addition to the:

1. citizens outside India, and
2. associates, branches or subsidiaries outside India, of companies or bodies corporate, registered or incorporated in India.

The Consumer Protection Act, 1986

Consumer is a stakeholder of a company who deals with the company's product or services. It is the responsibility of the government to protect their interest and rights. The basic objectives of the consumer protection Act, 1986 are:

- The right to be protected against marketing of goods and services which are hazardous to life and property
- The right to be informed about the quality, quantity, purity, standard, and price of goods or services
- Protect the consumer against unfair trade practices
- Consumer education
- Consumer redressal

The Environment (Protection) Act, 1986

Environmental degradation has become a very serious issue in recent years. The need for covering all aspects of the environment resulted in the enactment of the Environment (Protection) Act, 1986. This need has been internationally recognised and a decision to protect and improve environment was taken at the United Nations Conference on Human Environment at Stockholm in June 1972. The mankind has been exploiting, using and abusing earth for centuries. Rapid industrialisation and population explosion are the key factors for environmental degradation. If the environmental pollution is not checked on controlled, the quality of life will deteriorate and earth would become uninhabitable. Environmental legislation intends to control the environmental degradation to improve quality of life and health of the inhabitants.

Question 29:

(a) State the importance of going Concern Concept in preparation of Corporate Financial Statements in India. How is the term' Foreseeable future' defined in this context?

Answer:

Management may not prepare financial statements applying going concern basis in case there exists significant doubt about the going concern status of the enterprises. The point has not been taken care of in Section 217 (2AA).

In India preparation and presentation of Corporate financial statements are governed by accounting policies stated in the Companies Act and any other status that govern the reporting entity, accounting standards and other documents stating accounting policies, measurement and disclosure issued by the institute of Chartered Accountants of India or any other regulatory authority like SEBI, RBI, IRDA etc. they together form Indian GAAP. In fact while preparing Financial Statements it is necessary to follow Indian GAAP.

Corporate financial statements are prepared following going concernll assumption which implies that the reporting entity is expected to continue operations in the foreseeable future and it has neither the intention nor necessity of liquidation or of curtailing the scale of operations. In India the Corporate management is not required to make explicit disclosure as regards the validity of going concern assumption. The term foreseeable future is also not defined in the accounting standard. Considering the uncertainties involved in the predication of business continuity, foreseeable future should not taken as distant future.

Parameters of identifying going concern uncertainty:
Forecasts and budgets
Borrowings requirement
Liability management
Contingent liabilities
Product and markets
Financial risk management

Other factors including consistency of earning, stability of cost base, recurring operating losses, arrears of dividends, work stoppage, etc.

The Institute of Chartered Accountants of India has issued SAP –16 Going Concern. This audit standard attempts to capture going uncertainty in the line of ISA – 23. Generally, financial statements are prepared on the basis of fundamental assumption of going concern. It is necessary for the auditors to consider the appropriateness of the going concern assumptions. The auditors should consider the existence of the following indications which risks the going concern Assumption:

Financial Indications

1. Negative net worth or negative working capital
2. Fixed term borrowing approaching maturity without realistic prospects of renewal or repayment or excessive reliance on short term borrowings to finance long term assets.
3. Adverse key financial ratios
4. Substantial operating losses
5. Substantial negative cash flow from operations
6. Arrears or discontinuance of dividends
7. Inability to pay creditors on due dates
8. Difficulty in complying with the terms of long agreements
9. Change from credit to cash on delivery transaction with suppliers.

10. Inability to obtain financing for essential new product development or other essential investments.
11. Entering into scheme of arrangement with Creditors for reduction of Liability.

Operating Indications:

1. Loss of key management without replacement.
2. Loss of a major market, franchise, License, or principle Supplier.
3. Labour difficulties or shortage of important supplies.

Other Indications:

1. Non Compliance with Capital or other Statutory requirements.
2. Pending legal proceedings against the entity may if successful result in Judgments that could not be met.
3. Changes in Legislation or Government policy.
4. Sickness of the entity under any statutory definition.
5. The Significance of such dedications can often be mitigated by other factors.

To resolve the doubt about the appropriateness of the going concern assumption the auditor should gather sufficient audit evidence.

(b) Why should Corporate Social Responsibility (CSR) look beyond the concept of philanthropy?

Answer:

Corporate Social Responsibility (CSR) is a management concept where good business is not only seen as maximization of shareholder value but also of stakeholder value. It is about the management of a company's impact on its stakeholders, the environment, and the community in which it operates. It is more than just a philanthropic activity for some charitable causes. It is about the integrity with which a company governs itself, how it fulfills its mission, the values it has, what it wants to stand for, and how it engages with transparency. Here, the corporations have to move beyond the financial bottom-line to the social and environmental bottom line.

Corporate philanthropy is certainly a piece of the CSR puzzle. The thing to understand here is that it is just that: a piece. CSR and corporate philanthropy are often viewed as interchangeable terms because many of the most basic CSR efforts are philanthropic in nature. However, CSR encompasses more than corporate giving. CSR programs take a proactive approach to reduce negative impacts and increase positive impacts on the people and environment the corporation touches. For eg., a partnership with a non-profit organization can mean more than giving a hefty annual donation, joining as a corporate member, or sponsoring events. In a CSR program, a true partnership might mean encouraging

employees to volunteer their time, hosting public awareness and educational events, or contributing services that are useful to the organization.

Corporate Social Responsibility looks beyond the interests of traditional stakeholders and considers impacts on employees, customers, vendors, suppliers, communities, and the natural environment. This approach to business strategy takes the minimum expected efforts, such as compliance with regulations and managing obvious risks, and goes a step further all within a thoughtfully developed and well organized program that aligns with the company's strategic plan.

CSR goes beyond philanthropy. It has to take into account integrity and accountability in the long-run process of sustainability. For a better understanding of this concept, it has been divided into four broad aspects of CSR:

- Responsibility
- Accountability
- Sustainability
- Social contact

Responsibility:

William Frederick (1994) has taken the concept of CSR to a higher level by discussing about corporate responsiveness. According to him, corporate social responsiveness refers to the capacity of a corporation to respond to social pressures. Ethically accepted corporate activity and profit-making are not mutually exclusive. Sustainable growth and success demands ethicality in the process of dealing with stakeholders. Often, CSR has been challenged on the grounds of relativity, which means that what may be considered right by one may be considered wrong by another. Arriving at a consensus for CSR checklists may not be easy.

Accountability:

The easiest way to understand the different levels of accountability is to adhere to the report on Social Responsibilities of Business Corporations issued by the Committee for Economic Development (CED) in 1971. The report consists of the three concentric circles: Inner Circle, Intermediate Circle and Outer Circle. CSR includes integrity and accountability because it demands knowledge that goes beyond the traditional framework of business understanding, i.e., profit-making and bottom line.

Sustainability:

Sustainability places an extended set of expectations on business. Such issues as layoffs, plant closures, product quality, financial frauds, or industrial pollution demand the consideration of a diverse and complex range of systematic solutions. The reason CSR has to promote beyond philanthropy is because familiarity with unethical practices often makes society extremely tolerant and insensitive. The objectives of a company's CSR governance must be clearly defined with respect to its different stakeholders. The business environment will always be in a

continuous state of flux due to the influence of socio-economic and political changes in the micro and the macro level. Therefore, CSR needs a strategy that needs to uphold the ethical standards.

Social Contract:

CSR is related to the social contract between the business and the society in which it operates. At any one time in any one society, there is a set of generally accepted relationships, obligations, and duties between the major institutions and the people. Though business has the bigger responsibility of going beyond philanthropy, one must also keep in mind that each stakeholder also has reciprocal duties with others and the consuming community also has the obligation to make the tradeoff between cost and sustainability and integrity. Different stakeholders also cannot be driven by their selfish interests alone because each stakeholder has an important role to play and one cannot be destroyed for the benefit of the other.

(c) How do asset characteristics influence computation of WLCC?

Answer:

The characteristics (i.e. physical and functional) of new or existing facilities are very important aspects of WLCC computation. The research community has largely ignored this aspect of WLCC. For example, a relationship may exist between building function and mechanical services costs, a particularly important feature of modern facilities. Little research has been published with regard to the impact of building characteristics on WLCC. Experience shows that an indirect link exists through many aspects, including energy costs for example. A poorly insulated building will consume more energy, thus increasing WLCC and possible downtime costs in maintenance (Department of Industry 1977). The characteristics that should be assessed and included in the computation of WLCC include:

- Layout and location
- Functionality
- Construction technology
- Gross floor area
- Number of storeys and storey height
- Glazing area
- Occupancy (m2/person)
- Shape of the facility
- Aesthetics
- Energy-saving measures
- Quality of components
- Type and quality of public health systems
- Type and quality of superstructure building fabric
- Type and quality of internal fabric

- Type and quality of electrical and mechanical services
- Extent of site works.

Question 30:

(a) Evaluate the concept of Social Responsibility of Business

Answer:

Evolution of the Concept of Social Responsibility of Business

The evolution of the concept of social responsibility of business is the result of different stages of struggle. Business began merely as an institution for the purpose of making money. Man was considered successful so long as he made money and kept himself out of jail. He felt no particular obligation and acknowledged no responsibility to the public. As an owner of his business, he thought that he had a perfect right to do what he pleased with the money he earned. Social norms and attitudes had very little influence on the practice of management. Even in USA, business ventures like those of John D. Rockfeller, G.F. Swift, J.P. Morgan are noted for their flagrant disregard of society, the individual worker, and competitive business firms.

But by 1920s, the position changed and the word 'service' became the slogan of innumerable business clubs and associations. At the same time, business, leaders as a whole were becoming increasingly conscious of the fact that the public was an integral part of the general business scheme. The sense of service, thus, qualified and modified the greed for profit. Economic orders came to recognise social order as their very foundation. It is now increasingly recognised that what is not for the public good is not for the good of business.

The second element that helped the evolution process was the purchasing power of the public. The demand of the public meant nothing unless backed by purchasing power. Industry had come to understand that one of its proper functions was to manufacture and distribute purchasing power, besides manufacturing and distributing merchandise. The most important effect of this change in the attitude was a new business policy which demanded a persistent tendency towards higher wages and lower prices. Thus, the new social responsibilities of business came to be recognised.

Yet, one more element in this evolution process has been the rise of new relationship between the public and business. The era of purely private business for private profits has gone. Business has a duty to report to the public whose money it is constantly seeking, in order to conduct the business itself. According to Nicholas N. Eberstadt (1973):

Today's corporate social responsibility movement is a historical swing to re-create social contract of power with responsibility, and as such...the most important reform of our time.

To Keith Davis (1973), "Social responsibility has become the hallmark of mature, global civilization.

(b) Explain briefly the key strategies which can be used at the time of implementation of Corporate Social Responsibility policies and practices in a company.

Answer:

The various strategies which may be used at the time of implementation of CSR policies and practices in a company are:

1. Top management initiative:

- The attitude of top management towards CSR can determine whether or not an entity would actually carry out CSR measures. The top management can provide strong and visible support for the entity's commitment towards CSR by incorporating CSR measures in entity's Mission, Vision and Values statements.
- The Mission, Vision and Values statement of a socially responsible business should go beyond 'making profit' and specify that the entity will -
  1. engage in ethical and responsible business practices; and
  2. Promote the interests of all the stakeholders.

2. Integration of CSR in decision making:

- CSR is viewed as a comprehensive set of policies, practices and programs that are integrated into decision-making processes throughout the organisation. Therefore, an entity should incorporate CSR initiatives in its core business operations and strategies.
- The organisation should set specific goals for CSR.
- At the stage of planning, the organisation should lay down the measures for evaluating the progress from time to time.
- As far as possible, the goals should be laid down in quantifiable terms.

3. Management Structure:

- To promote the achievement of its CSR objectives in a more effective manner, an entity should integrate CSR measures in all its operations and business decisions.
- An entity may establish a CSR Committee and other related or sub-committees for promotion and enforcement of CSR. The functions of the CSR Committee should be to identify and evaluate the key CSR issues, and to integrate the key CSR issues in all the functions of management.
- The issues that represent a company's CSR focus vary by nature of business, by size, by sector and even by geographic region. Therefore, there cannot be a universally accepted management structure for promotion of CSR Thus, it has been rightly said, and "Creating a CSR structure is not a 'one size fits all' exercise.

4. Accountability for CSR in job profiles:

- An entity should clearly fix the responsibilities of its managers and employees for promotion and achievement of CSR objectives.
- The job profiles and job descriptions of each manager and employee should be customised to include the guidelines, examples and tools that fit his level of commitment and involvement in CSR.

5. Employee recognition and rewards:

- Employees tend to engage in behaviour that is recognized and rewarded and avoid
- behaviour that is penalised.
- An entity should implement a 'Reward Program' for recognising and rewarding those managers and employees who have contributed towards successful implementation of CSR measures or activities. This would act as a strong motivating force for the workforce to contribute towards entity's CSR objectives.
- The Reward Program may be in the nature of publication of a magazine periodically, including therein the highlights of CSR measures undertaken by the employees, or awarding the employees with letters of appreciation, certificates for excellent performance or small gifts like T-Shirts, mugs, pens, or giving them direct or in direct financial assistance.
- Also, the entity should participate in the award ceremonies organised at State and National level for recognising and rewarding those entities and individuals who have contributed towards CSR

6. Recruitment and promotion policies:

- The recruitment and promotion policies of the entity should clearly highlight the entity's commitment towards CSR.
- The CSR activities undertaken by the managers and employees should carry appropriate weightage at the time of recruitment, selection and promotion.

7. Training programs:

- The entity should regularly conduct comprehensive training and development programs emphasising the importance of CSR.
- The employees should be trained about their roles in implementation of CSR measures and attainment of CSR objectives.
- The training program should serve as a vehicle for sharing experiences and a source for learning and developing best practices throughout the entity. It should serve as an inspiration for continuous improvement.
- Proposals and initiatives by the employees should be welcome and the entity should provide necessary facilities for implementation of all such CSR measures or activities that are in line with entity's CSR objectives.

8. Implementation of CSR:

- CSR requires an entity to integrate social, environmental and ethical concerns into its business process. Therefore, just like any other business function, CSR performance and compliance should also be subject to review and control.
- If CSR performance is neither measured nor rewarded, the employees commitment towards CSR would come down, and the stakeholders would conclude that CSR is of secondary importance.

9. Influencing others to be socially responsible:

- An entity which is, and is recognised by others as, socially responsible, is in a position to influence the behaviour of others, from business partners to industry colleagues to neighbouring businesses. Such entity should play a leadership or pioneer role by sharing its experiences with others and, encouraging others, to be socially responsible.
- An entity, by influencing others to be socially responsible, performs CSR as it is in everyone's best interest to have as many persons as possible honouring the requirements and expectations of CSR.

10. CSR reporting and audit:

- An entity should regularly publish CSR Reports. It would help the entity to build and reinforce trust with all the stakeholders. The CSR Reports should be aimed at increasing the awareness and importance of CSR.
- CSR reports should highlight the CSR activities undertaken by the entity, the employees who played a key role in achievement of CSR initiatives.
- CSR reporting reflects that the top management is serious about its commitment towards CSR, and that CSR is not used just for name sake, or for building image.
- An entity may also decide to obtain an independent third party verification of the CSR report. Alternatively, it may get CSR Audit done by external auditors and publish the results of such audit.