Company and Lifting of the “Corporate Veil”

Question 1

What is a company?

Answer

Section 2 (20) of the Companies Act, 2013 defines a ‘company’ as a company incorporated under this Act or under any previous company law.

The most striking feature of the company form of organisation is that it comes into existence by a legal process called “incorporation”, whereby it acquires the unique characteristic of being a separate legal entity. In other words when a company is registered, it is clothed with a legal personality with the following features:

a. Perpetual succession: A company is distinct and separate from its members who may die or change without affecting its continued existence until it is wound up on the grounds and in the manner as specified by the Act.

b. Separate Entity: A company can own property, have banking account, raise loans, incur liabilities and enter into contracts. Even members can contract with company, acquire right against it or incur liability to it.

c. Limited Liability: For the debts of the company, its creditors can sue it and not its members whose liability is limited to the unpaid amount on shares held by them or the guarantees provided by them to contribute on the winding up of the company, depending on the type of company.

d. As the company is an artificial person, it can act only through some human agency, viz., members and directors. The directors are responsible for the management and the administration of the affairs of the company on all matters except those which can be authorized by the members at general meetings in accordance with the various provisions of the Companies Act 2013. However, they are not the agents of the members of the company.

e. Common Seal: Every company has a common seal which is affixed on documents and contracts in order to authenticate its formal acts.
Question 2

‘A company is a person separate from its members’. Explain.

Examine the circumstances under which the Courts may disregard the Company’s Corporate Personality.

Or

What do you understand by “separate legal entity of the company?” State the circumstances where under the separate legal entity of the company can be ignored and liability can be imposed on the persons regulating the affairs of the company?

Or

Under what circumstances the law disregards the principle that a company is a separate legal entity distinct from its members?

Or

Briefly state the circumstances to lift the status of corporate legal entity of company under the Companies Act, 2013?

Or

Explain clearly the meaning of Lifting the Corporate Veil, as applicable in case of companies incorporated under the Companies Act, 2013. Under what circumstances the veil of a company can be lifted by the court?

Answer

A company in the eyes of law is regarded as an entity separate and distinct from its members. Any of its members can enter into contracts with the company in the same manner as with any other individual. Further, a shareholder or member of a company cannot be held liable for the acts of the company even if he holds virtually the entire share capital. The company’s money and property belong to the company, and not to the shareholders. (Salomon v. Salomon & Co. Ltd.).

This principle of differentiating the legal entity of the company from that of its shareholders may be referred to as ‘the veil of incorporation’. The Courts in general consider themselves bound by this principle. The effect of this principle is that the members or shareholders of a company cannot be held liable in respect of any liability accruing on the company. A company is expected by law to meet its liabilities and obligations from its own resources and its members cannot be called upon to discharge the same.

However, under certain exceptional circumstances the courts may disregard or pierce the corporate veil of a company and hold persons controlling the affairs of the company liable for the acts of the company. Where the legal entity of a corporate body is misused for fraudulent and dishonest purposes, the individuals concerned will not be allowed to take shelter behind the corporate entity of the company.
6.3 Business Law, Ethics and Communication

The human ingenuity, however, started using this veil of corporate personality blatantly as a cloak for fraud or improper conduct. Thus it became necessary for the Courts to break through or lift the corporate veil or crack the shell of corporate personality or disregard the corporate personality of the company. Thus while by fiction of law a corporation is a distinct entity, yet, in reality it is an association of persons who are in fact the beneficial owners of all the corporate property (Gallaghar v. Germania Brewing Co.).

The circumstances or the cases in which the Courts have disregarded the corporate personality of the company are:


2. **Prevention of fraud or improper conduct**: The legal personality of a company may also be disregarded in the interest of justice where the machinery of incorporation has been used for some fraudulent purpose like defrauding creditors or defeating or circumventing law. Professor Gower has rightly observed in this regard that the veil of a corporate body will be lifted where the ‘corporate personality is being blatantly used as a cloak for fraud or improper conduct’. Thus where a company was incorporated as a device to conceal the identity of the perpetrator of the fraud, the Court disregarded the corporate personality (Jones v. Lipman) (Gilford Motor Co. v. Home).

3. **Determination of character of a company whether it is enemy**: A company may assume an enemy character when persons in de facto control of its affairs are residents in an enemy country. In such a case, the Court may examine the character of persons in real control of the company and declare the company to be an enemy company. (Daimler Co. Ltd. v. Continental Tyre & Rubber Co. Ltd).

4. **Where the company is a sham**: The Courts also lift the veil or disregard the corporate personality of a company where a company is a mere cloak or sham (hoax). (Gilford Motor Co. Ltd. v. Home).

5. **Company avoiding legal obligation**: Where the use of an incorporated company is being made to avoid legal obligations, the Court may disregard the legal personality of the company and proceed on the assumption as if no company existed.

6. **Company acting as agent or trustee of the shareholders**: Where a company is acting as agent for its shareholders, the shareholders will be liable for the acts of the company (F.G. Films Ltd., In re.)

7. **Avoidance of welfare legislation**: Where the courts find that there is avoidance of welfare legislation, it will be free to lift the corporate veil. (Workmen of Associated Rubber Industry Ltd. v. Associated Rubber Industry Ltd.).

8. **Protecting public policy**: The Courts invariably lift the corporate veil or a disregard the corporate personality of a company to protect the public policy and prevent transactions contrary to public policy. (Connors v. Connors Ltd.).
9. **In quasi-criminal cases:** The courts pierce the corporate veil in quasi-criminal cases in order to look behind the legal person and punish the real persons who have violated the law.

**Question 3**

*Some of the creditors of M/s Get Rich Quick Ltd. have complained that the company was formed by the promoters only to defraud the creditors and circumvent the compliance of legal provisions of the Companies Act, 2013. In this context they seek your advice as to the meaning of corporate veil and when the promoters can be made personally liable for the debts of the company.*

**Answer**

**Corporate Veil:** After incorporation, the company in the eyes of law becomes a different person from the shareholders who have formed the company. The company has its own existence and as a result the shareholders cannot be held liable for the acts of the company even though they hold the entire share capital of the company. This recognition of the company as a separate legal entity and being liable for its own acts and liabilities, is known as the “Corporate Veil”. However, under certain exceptional circumstances the courts lift or pierce the corporate veil by ignoring the separate entity of the company and the promoters and other persons who have managed and controlled the affairs of the company. Thus, when the corporate veil is lifted by the courts, the promoters and persons exercising control over the affairs of the company are held personally liable for the acts and debts of the company. In the following circumstances, corporate veil can be lifted by the courts and promoters can be held personally liable for the debts of the company.

(i) Trading with enemy country.
(ii) Evasion of taxes.
(iii) Forming a subsidiary company to act as its agent.
(iv) The benefit of limited liability is destroyed by reducing the number of members below 7 in the case of public company and 2 in the case of private company for more than six months.
(v) Under law relating to exchange control.
(vi) Device of incorporation is adopted to defraud creditors or to avoid legal obligations.

**Question 4**

*ABC Pvt. Ltd., is a Private Company having five members only. All the members of the company were going by car to Mumbai in relation to some business. An accident took place and all of them died. Answer with reasons, under the Companies Act, 2013 whether existence of the company has also come to an end?*
Answer

Death of all members of a Private Limited Company, Under the Companies Act, 2013:
The most distinguishing feature of a company is its being a separate entity from the shareholders and promoters who form it. This lends stability and perpetuity to the company form of business organization. In short a company is brought into existence by a process of law and can be terminated or wound up or brought to an end only by a process of law. Its life is not impacted by the death, insolvency or retirement of any or all shareholder(s) or director(s).

The provision for transferability or transmission of the shares helps to preserve the perpetual existence of a company by allowing the constitution and identity of shareholders to change.

In the present case, ABC Pvt. Ltd. does not cease to exist even by the death of all its shareholders. The legal process will be for the successors of the deceased shareholders to get the shares registered in their names by way of the process which is called “transmission of shares”. The company will cease to exist only when it is wound up by a due process of law.

Therefore, even with the death of all members (i.e. 5), ABC (Pvt) Ltd. does not cease to exist.

Question 5

F, an assessee, was a wealthy man earning huge income by way of dividend and interest. He formed three Private Companies and agreed with each to hold a bloc of investment as an agent for them. The dividend and interest income received by the companies was handed back to F as a pretended loan. This way, F divided his income into three parts in a bid to reduce his tax liability.

Decide, for what purpose the three companies were established? Whether the legal personality of all the three companies may be disregarded.

Answer

The House of Lords in Salomon Vs Salomon & Co. Ltd. laid down that a company is a person distinct and separate from its members, and therefore, has an independent separate legal existence from its members who have constituted the company. But under certain circumstances the separate entity of the company may be ignored by the courts. When that happens, the courts ignore the corporate entity of the company and look behind the corporate façade and hold the persons in control of the management of its affairs liable for the acts of the company. Where a company is incorporated and formed by certain persons only for the purpose of evading taxes, the courts have discretion to disregard the corporate entity and tax the income in the hands of the appropriate assessee.

(1) The problem asked in the question is based upon the aforesaid facts. The three companies were formed by the assessee purely and simply as a means of avoiding tax and the companies were nothing more than the façade of the assessee himself. Therefore the whole idea of Mr. F was simply to split his income into three parts with a view to evade tax. No other business was done by the company.
The legal personality of the three private companies may be disregarded because the companies were formed only to avoid tax liability. It carried on no other business, but was created simply as a legal entity to ostensibly receive the dividend and interest and to hand them over to the assessee as pretended loans. The same was upheld in Re Sir Dinshaw Maneckji Petit AIR 1927 Bom.371 and Juggilal vs. Commissioner of Income Tax AIR (1969) SC (932).

Question 6

Explain clearly the concept of “perpetual-succession” and “common-seal” in relation to a company incorporated under the Companies Act, 2013.

Answer

Perpetual Succession and Common Seal: Perpetual succession means the continued existence of any entity until the time that it is wound up by following a due process of law. A company is an artificial legal person with a perpetual existence. It never dies nor does its existence depend upon the life of its members. It is not in any manner affected by insolvency, mental disorder or retirement of any or all of its members. It is created by a process of law and can be put to an end only by the process of law. Members may come and go but the company will go on forever (until dissolved). It continues to exist even if all its members are dead.

Since a company has independent existence and since all acts of the company are done in the name of the company and since the company is responsible for its own acts, it must have a “Seal” known as “common seal”. The common seal of a company is equivalent to the signature of the company and is therefore required to be affixed on all documents executed by the company. The affixation of the common seal by the company on any document makes the document authentic as an act by the company and the company is bound by such acts. The common seal of the company is kept in safe custody by a responsible officer of the company.

Question 7

State whether the following statement is correct or incorrect:

A company is a legal person but not a citizen.

Answer

Correct

Classes of Companies under the Act

Question 8

What is meant by a Guarantee Company? State the similarities and dissimilarities between a Guarantee Company and a Company having Share Capital.
Meaning of Guarantee Company: Where it is proposed to register a company with limited liability, the choice before its promoters is either to limit their liability by the value of shares purchased by them or by limiting their liability by the amount of guarantees given by them. Section 2 (21) of the Companies Act, 2013 defines a Company Limited by Guarantee as a company having the liability of its members limited by the memorandum to such amount as the members may respectively undertake to contribute to the assets of the company in the event of its being wound up.

Thus, the liability of the members of a guarantee company is limited to a stipulated amount in terms of individual guarantees given by members and mentioned in the memorandum. The members cannot be called upon to contribute more than such stipulated amount for which each member has given a guarantee in the memorandum of association. The articles of association of such company shall state the number of members with which the company is to be registered.

Similarities and dis-similarities between the Guarantee Company and the Company having share capital: The common features between a “guarantee company” and the “company having share capital” are legal entity and limited liability. In case of a company limited by shares, the liability of its members is limited to the amount remaining unpaid on the shares held by them. Both these type of companies have to state this fact in their memorandum that the members’ liability is limited.

However, the dissimilarities between a ‘guarantee company’ and ‘company limited by shares’ is that in the former case the members will be called upon to discharge their liability only after commencement of the winding up of the company and only to the extent of amounts guaranteed by them respectively; whereas in the case of a company limited by shares, the members may be called upon to discharge their liability at any time, either during the life of the company or during the course of its winding up and the amount payable by the members will be limited to the unpaid amount on shares held by them respectively.

Further to note, the Supreme Court in Narendra Kumar Agarwal vs. Saroj Maloo (1995) 6 SC C 114 has laid down that the right of a guarantee company to refuse to accept the transfer by a member of his interest in the company is on a different footing than that of a company limited by shares. The membership of a guarantee company may carry privileges much different from those of ordinary shareholders in companies limited by shares.

It is also clear from the definition of the guarantee company that it does not raise its initial working funds from its members. Therefore, such a company may be useful only where no working funds are needed or where these funds can be had from other sources like endowment, fees, charges, donations etc.

Question 9

Can a non-profit organization be registered as a company under the Companies Act? If so, what procedure does it have to adopt?
Answer

Registration of a non-profit organisation as a company: According to section 8 (1) of the Companies Act 2013, the Central Government may allow person or an association of persons to be registered as a Company under the Companies Act if it has been set up for promoting commerce, arts, science, sports, education, research, social welfare religion, charity protection of environment or any such other useful object and intends to apply its profits or other income in promotion of its objects. However, such company has to prohibit payment of any dividend to its members.

Procedure: An association of persons intending to carry any or all or some of the activities mentioned in section 8 (1) as mentioned above, has to apply to the Central Government seeking its permission for being set up as a company under the Act. The central government if satisfied on the above may by the issue of a licence in such manner as may be prescribed and on such conditions as it may deem fit, allow such association to be registered as a limited company under section 8 (1) without the addition of word “Limited” or words “Private Limited” as the case may be, to its name.

After the issue of the licence by the Central Government, an application must be made to the Registrar in the prescribe form after which the Registrar will register the association of persons as a company under section 8(1). Under section 8 (2) a company registered under section 8 (1) as above, shall enjoy all the privileges and be subject to all the obligations of a limited company.

This licence issued by the Central Government is revocable, and on revocation the Registrar shall put the words 'Limited' or 'Private Limited' against the company's name in the Register. But before such revocation, the Central Government must give the company a written notice of its intention to revoke the licence and provide an opportunity to it to be represented and heard in the matter.

[Note: As per the Notification S.O. 1353(E), dated 9th Of July, 2014, the Central Government hereby delegates to the ROC the power & functions vested in it under the section 8(1) of the Companies Act, 2013, subject to the condition that the Central Government may revoke such delegation of powers or may itself exercise the powers & functions under the said sections, if in its opinion, such course of action is necessary in the public interest.]

Question 10

Mr. V, along with six other persons desires to float a company for charitable purposes, as permissible under Section 8 of the Companies Act, 2013. He seeks your advise about the procedure to be followed to give effect to the above proposal. Advise him.
Company for charitable purposes (Section 8 of the Companies Act, 2013): According to Section 8 of the Companies Act, 2013 the procedure to be followed to give effect to the said proposal is as follows:

1. Mr. V, and the six other persons with him should first prepare and sign the MOA and AOA (which may either be drafted in its own format or may be in the formats available in the Companies Act.)
2. The company may either be limited by shares or by guarantee and the choice made must be mentioned in the Memorandum of Association (MOA).
3. The object of the proposed company must be for promoting commerce, arts, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other useful object.
4. The Articles of Association (AOA) will include a clause prohibiting the distribution of dividend.
5. All the profits of the company should be applied on the promotion of its objects as mentioned above and incorporated in the MOA and the AOA.
6. The association of persons (Mr V and his friends) should apply to the Central Government seeking a license for the formation of the proposed company.
7. The Central Government will on being satisfied of the facts of the case, issue a license to the Association of Persons (AOP) and may impose any conditions which it deems fit.
8. On receipt of the license from the Central Government, the Association of Persons (AOP) shall apply to the Registrar in the prescribed form with the required documents for registration of the company.
9. The registration process of the company with the Registrar of companies will start with the approval of the name of the proposed company for which three options will be submitted to the Registrar in the prescribed format with the prescribe fee.
10. The Registrar will provide the names available and one will be finally chosen by the promoters for use.
11. After getting the name from the ROC, the draft MOA and AOA must be got approved by Regional Director who has been delegated the powers by the Central Government.
12. Three copies of a approved MOA and AOA along with the registration and filing fee, documents like form 1, 18, 32 and consent etc. must be submitted.
13. A power of attorney in favour of Practicing CA/CS/CMA or an advocate for presentation before ROC to make corrections and collect incorporation certificate must also be filed on non judicial stamp paper.
14. The company becomes operative on receipt of the certificate of incorporation.

[Note: As per the Notification S.O. 1353(E), dated 9th Of July, 2014, the Central Government hereby delegates to the ROC the power & functions vested in it under the section 8(1) of the...
Question 11
State whether the following statement is correct or incorrect:
'A private limited company must have a minimum of two directors, while a public limited company must have at least three directors.

Answer
Correct

Question 12
Under what circumstances a company becomes subsidiary of another company under the provisions of the Companies Act, 2013?

Answer
Holding and Subsidiary Companies are relative terms. A company is a holding company of another only if the other is its subsidiary. Section 2 (87) of the Companies Act 2013 lays down the circumstances under which a company becomes a subsidiary company of another company which becomes its holding company. These circumstances are as under:

(a) When the holding company controls the composition of Board of Directors of the subsidiary company or companies, or

(b) When the holding company exercises or controls more than one half of the total share capital either on its own or together with one or more of its subsidiary companies, or

(c) Where a company is the holding company of the company which fulfils any of the above conditions, e.g., if A Ltd is the holding company of B Ltd, but C Ltd is the holding company of A Ltd, then B Ltd will automatically become a subsidiary of C Ltd.

Question 13
With reference to the provisions of the Companies Act, 2013 explain the circumstances under which a subsidiary company can become a member of its holding company. Examine the position of the following with regard to membership in a company:

(i) An Insolvent

(ii) Partnership Firm.

Answer
In accordance with the provisions of Section 19 of the Companies Act, 2013, a subsidiary company cannot either by itself or through its nominees hold any shares in its holding company and no holding company shall allot or transfer its shares to any subsidiary
companies. Any such allotment or transfer of shares in a company to its subsidiary is void. The section however does not apply where:

(a) the subsidiary company holds shares in its holding company as the legal representative of a deceased member of the holding company, or
(b) the subsidiary company holds such shares as a trustee, or
(c) the subsidiary company was a shareholder in the holding company even before it became its subsidiary.

Position of the following with regard to membership in a company:

(i) Partnership Firm: Section 2 (55) of the Companies Act 2013 defines a member as a subscriber to the memorandum of association whose name is entered in the Register of Members following the incorporation of the company, every other person who agrees in writing to become a member of the company and whose name is entered in the register of members of the company and any person holding shares in a company and whose name is entered as the beneficial owner in the records of the depository.

A partnership firm may therefore hold shares in a company provided its name appears in the register of members of the company. However, as a firm is not a legal entity it will be able to hold shares in the individual names of partners as joint shareholders. However, this will not apply to a “Limited Liability Partnership". (Ganesh Das Ram Gopal v. R.G. Cotton Mills Ltd.)

Under section 8 (3) of the Companies Act 2013, a firm may be a member of a company incorporated under section 8 i.e. a company formed as a charitable or social venture.

(ii) An Insolvent: An insolvent may be a member of a company. So long as his name appears in the register of members, he is a member and is entitled to vote even though his shares vest in the Official Assignee or Receiver. (Morgan v. Gray) allotment or transfer of shares is by way of security for the purpose of a transaction.

Question 14

The paid-up Share Capital of AVS 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. XYZ Private Limited and BCL Private Limited are holding 3 lacs Equity Shares and 1,50,000 Equity Shares respectively in AVS Private Limited.

XYZ Private Limited and BCL Private Limited are the subsidiaries of TSR Private Limited.

With reference to the provisions of the Companies Act, 2013, examine whether AVS Private Limited is a subsidiary of TSR Private Limited? Would your answer be different if TSR Private Limited has 8 out of total 10 directors on the Board of Directors of AVS Private Limited?
Answer

Holding, subsidiary relationship: In terms of section 2 (87) of the Companies Act 2013, a company will be the subsidiary of a company which holds more than one half of the total share capital in it through its subsidiary company or companies. In this case XYZ Pvt Ltd and BCL Pvt Ltd together holds more than 50% of equity shares in AVS Pvt Ltd and both these companies are subsidiaries of TSR Pvt Ltd, so it will have a majority stake in the composition of the Board of Directors of AVS Pvt Ltd. Hence, TSR Pvt Ltd will be treated as the holding company of AVS Pvt Ltd.

Question 15

Which of the institutions are regarded as “Public Financial Institutions” under the Companies Act, 2013?

Answer

Public Financial Institutions: By virtue of Section 2 (72) of the Companies Act, 2013 the following institutions are defined as public financial institutions:

(i) The Life Insurance Corporation of India established under the Life Insurance Act 1956
(ii) The Infrastructure Development Finance Co Ltd
(iii) Specified company referred to in Unit Trust of India (Transfer of Undertaking and Repeal) Act, 2002
(iv) Institutions notified by the Central Government in consultation with the Reserve Bank of India
(v) institutions notified by the Central Government under section 4A(2) of the Companies Act, 1956 so repealed under section 465 of this Act

Section 2 (72) further provides that no institution shall be notified by the Central Government as above unless:

a. It is established or constituted by any Central or State Government Act; or
b. Not less than fifty one percent of the paid up share capital is held or controlled by the Central Government or any State Government or partly by the Central Government and partly by one or more State Governments.

[Note: - The Ministry of Corporate Affairs (MCA) vide General Circular No. 34/2011 dated 2nd June, 2011 has framed the following criteria for declaring any Financial Institution as PFI:

(a) A Company or Corporation should be established under a Special Act or the Companies Act being Central Act
(b) Main business of the Company should be Industrial / Infrastructural Financing
(c) The company must be in existence for at least 3 years and their financial statement should show that their income from Industrial / Infrastructural financing exceeds 50% of...
their income

(d) The net worth of the company should be ₹ One thousand crore

(e) The company is registered as Infrastructure Finance Company (IFC) with RBI or as an Housing Finance Company (HFC) with National Housing Bank

(f) In the case of CPSUs/SPSUs, no restriction shall apply with respect to financing specific sector(s) and net worth

Any financial institution applying for declaration as PFI shall fulfill the aforesaid criteria.]

Conversion of Public Company into a Private Company

Question 16

Define a Private Company. Explain the procedure for conversion of a Public Company into a Private Company.

Answer

Definition of a Private Company: According to Section 2 (68) of the Companies Act, 2013 a 'private company' means a company which has a minimum paid-up capital of one lakh rupees or such higher paid-up capital as may be prescribed and which by its Articles:

(a) restricts the right to transfer its shares if any.

(b) limits the number of its members to 200 not including its employee members (present or past) [Joint holders of shares are treated as a single member].

(c) prohibits any invitation to the public to subscribe for any securities of the company.

Procedure for conversion of a Public Company into a Private Company: Section 14 (1) states that subject to the provisions of the Companies Act 2013 and the conditions contained in the Memorandum, a company may, by special resolution, alter its Articles including alterations which may have the effect of converting a public company into a private company (or vice versa).

Further any alteration which has the effect of converting a public company into a private company will not have any effect except with the approval of the Tribunal which may pass such order as it deems fit.

Hence, the broad procedure for conversion of a public company into a private company would comprise of the following steps:

1. Check that the Memorandum of Association does not contain any restrictive clause. If yes, alteration of the Memorandum will be necessary through a special resolution;

2. Alteration of the Articles to incorporate the restrictions required u/s 2 (68) by a special resolution

3. Application to the Tribunal for approval of the change
4. After the approval of the Tribunal, every alteration of the articles and a copy of the order of the Tribunal approving the alteration shall be filed with the Registrar, within a period of fifteen days, who shall register the same.

5. Any alteration of the articles registered as above shall be valid as if it were originally in the articles.

Question 17
State whether the following statement is correct or incorrect:
If the Central Government permits, a public company can be converted into a private company.

Answer
Incorrect. The approval is required from the Tribunal not the Central Government u/s 14 (1) of the Companies Act 2013

Procedure for Conversion of a Private Company into a Public Company

Question 18
What is the procedure laid down in the provisions of the Companies Act, 2013 for converting a private company into a public company?

Or

Board of Directors of a private company decided to convert it into a public company. State the steps to be taken for such conversion in order to comply with the requirements under the Companies Act, 1956.

Answer
Conversion of Private Company into a Public Company

The Companies Act 2013 vide section 14 lays down the provisions for the conversion of a Private Company into a Public Company and vice versa.

1. Section 14 (1) provides that subject to the provisions of the Act and the conditions in the memorandum, a company may by passing a special resolution alter its Articles including alterations having the effect of converting a private company into a public company and vice versa.

2. A private company may alter its Articles in such a manner that the restrictions and limitations, which are required for a private company under this Act, are removed and no longer exist in the Articles; the company shall from the date of such alteration cease to be a private company.

3. Further, no resolution passed to convert a private company into a public company shall not take effect until it is approved by the Tribunal which shall make such orders as it may deem fit.
4. Section 14 (2) provides that an alteration of the Articles along with the copy of the order of the Tribunal shall be filed with the Registrar, together with a copy of the altered Articles, within 15 days, in such manner as may be prescribed. On receipt of the above documents the Registrar shall register the same.

5. Section 14 (3) provides that any alteration in the Articles duly registered shall, subject to the provisions of the Act, be valid as if it were in the original Articles.

From the above provisions of the Companies Act, the following procedure for conversion of a private company into a public company is applicable:

(i) Convening a Board Meeting to take necessary decision to fix the time, place and agenda for convening a General Meeting of members.

(ii) At the general meeting of members will be to amend the Name Clause in the Memorandum by removing the word ‘Private’ by passing a special resolution. Approval of Tribunal is not necessary for change of name.

(iii) The general meeting must also pass a special resolution deleting from its articles the restricting clauses of a private company under Section 2(68). Similarly all other clause in the articles which do not apply to a public company should be deleted and those which apply to private companies should be inserted such as increasing the number of shareholders to at least 7 and number of directors to at least 3. These resolutions will be passed clause by clause.

(iv) Application will be made to the Tribunal for approval to the various resolutions passed converting the private company into a public company.

(v) On receipt of the order of the Tribunal the documents will be filed with the Registrar along with a copy of the revised Articles and the Registrar will register the same.

(vi) On registration by the Registrar the process will be complete.

Question 19

Sparkle Infotech Ltd. was registered as a Public Company. There are 76 members in the Company as stated below:

(i) Directors and their relatives 36
(ii) Employees 12
(iii) Ex-employees (shares were allotted when they were employees) 8
(iv) 7 couples holding shares jointly in the names of husband and wife (7X2) 14
(v) Others 6

Total number of members 76
The Board of Directors of the Company proposes to convert it into a Private Company. Advise the Board of Directors about the steps to be taken for conversion into a Private Company including reduction in the number of members, if necessary, as per the Companies Act, 2013.

Answer

A private company as per Section 2(68) cannot have more than 200 members, hence the current shareholding will not be an issue.

The procedure for converting a public company will require:

(i) Passing of a Special Resolution authorizing the conversion and altering the articles so as to include therein the restrictions specified in Section 2(68)

(ii) Changing the name clause of the Memorandum of the company by omitting the word “Private”.

(iii) Obtaining the approval of the Tribunal as required by Section 14(1).

(iv) Filing of the documents along with a printed copy of the articles as altered with the Registrar within 15 days. [Section 14 (2)]

Privileges and Exemptions

Question 20

Define Private Company. Briefly explain the privileges and exemptions for a private company as provided under the Companies Act, 2013.

Answer

A private company means a company which has a minimum paid-up capital of one lakh rupees or such higher paid-up capital as may be prescribed, and by its articles –

(a) restricts the right to transfer its shares, if any;
(b) limits the number of its members to 200;
(c) prohibits any invitation to the public to subscribe for any shares in, or debentures of, the company;
(d) prohibits any invitation or acceptance of deposits from persons other than its members, directors or their relatives.

It enjoys some privileges and exemptions, which a public company is deprived of. These are as follows:

1. Two or more persons may form a private company [Section 3(1)(b)].
2. A private company is not required to have independent directors [Section 149 (4)].
3. A private company is exempt from the provisions of having an audit committee constituted by the Board of Directors [Section 177(1)]
4. The directorship of a private company which is either a holding or a subsidiary company of a public company will not be included in determining the maximum number of directorships that a person may hold in public companies which is restricted to ten [Section 165 (1)].

5. A private company is exempt from the constitution of a Nomination & Remuneration Committee [section 178(1)], as well as Stakeholders Relationship Committee [section 178 (5)].

It should be noted that as the number of members of a private company has been raised from 50 to 200, some exemptions have been withdrawn due to higher number of members.

Question 21

Whether a limited company can become partner in a partnership firm?

Answer

One of the important features of a company is that it is an artificial legal person. Being a legal entity, a company is capable of entering into contracts in its own name. According to Section 4 of the Indian Partnership Act, 1932, partnership is a contractual relationship between persons and a company falls within the definition of a person capable of contracting; therefore, there is no objection to a company in becoming a partner in a firm. Further, the limited liability element of a limited company is also not restrictive to a company becoming a partner in a firm even with an unlimited liability of the partnership firm and partners. This is, because, in a company it is the liability of members which is limited and not the company itself. However, it would be necessary for a company to be empowered by its Memorandum and Articles to become a partner in a firm.

Mode of Registration/Incorporation of Companies

Question 22

Explain in brief the mode of incorporation of a company.

Answer

Mode of registration/incorporation of company: In terms of section 3(1)(a) a public company may be formed for any lawful purpose with 7 or more persons by subscribing their names to a memorandum and complying with the requirements of the Companies Act for the registration of companies.

In exactly the same way, under section 3 (1)(b), 2 or more persons can form a private company.

Under section 3 (1)(c) a one person company may be formed by one person in which case the company will be a private company.
Persons who conceive the idea of forming the company and form the same under the provisions of the Act are known as promoters. They take all necessary steps for its registration.

(a) **Lawful purpose:** The essence of validly incorporated company is that it must consist of a particular number of persons and must be set up for a lawful purpose. Unless the purpose appears to be unlawful *ex facie* or is transparently illegal or prohibited by way of statute, it cannot be regarded as an unlawful purpose.

(b) **Applying for the name:** The promoters of the company should decide upon at least three suitable names in order of preference in order to afford flexibility to the Registrar in deciding on the availability of the best possible available name.

(c) **Documents to be filed:** After getting the name approved, certain documents along with the application and prescribed fees, should be filed with the Registrar.

(d) **Subscribing their names:** Subscribing the names means signing the names in the Memorandum signifying their intention to jointly form a company and take up the number of shares mentioned against each.

(e) **Certificate of incorporation:** Upon the registration of the documents mentioned earlier under the head “Documents to be filed for registration of the company” and the payment of the necessary fees, the Registrar of Companies issues a certificate that the company is incorporated, and in the case of a limited company that it is limited.

(f) **Commencement of business:** Under section 11(1) of the companies Act 2013, a company having share capital shall not commence business or exercise borrowing powers unless -

   i) a declaration is filed from its director with the Registrar that the subscribers have paid for the shares they had agreed to take and that the paid up capital of the company is not less than ₹ 5 Lakhs in case of public company and ₹ 1 lakh in case of private company; and

   ii) the company has filed with the Registrar a verification of its Registered Office

**Question 23**

*Which documents are required to be filed with the Registrar of Companies at the time of registration of a company under the provisions of the Companies Act, 2013?*

**Answer**

**Filing of document with the Registrar of Companies:**

After getting the name approved, the following documents along with the application and prescribed fee, are to be filed with the Registrar:-

1. Memorandum of Association
2. Articles of Association
(3) The agreement, if any, which the company proposed to enter into with any individual for appointment as its Managing or Whole Time Director or Manager.

(4) A declaration that the requirements of the Act and the rules framed there under have been complied with. This declaration is required to be signed by an advocate of the Supreme Court or High Court or an attorney or a pleader having the right to appear before High Court or a Company Secretary or a Chartered Accountant in whole time practice in India who is engaged in the formation of a company, or by person named in the Articles as a Director, Manager or Secretary of the company.

(5) In the case of a public company having share capital, where the Articles name a person as director/directors, the list of the directors and their written consent in prescribed form to act as directors and take up qualification shares.

(6) A company shall, on and from the fifteenth day of incorporation and all times thereafter, have a registered office capable of receiving and acknowledging all communications and notices as may be addressed to it.

(7) Apart from the above, the company shall furnish to the Registrar a verification of its registered office under Section 12 (2) within 30 days of incorporation in such manner as prescribed.

Question 24
What is the meaning of “Certificate of Incorporation” under the provisions of the Companies Act, 2013?

OR

State the conditions which are applicable for the purpose of commencement of business by a public company under the Companies Act, 2013.

Answer

Certificate of Incorporation: Under section 7 (2) the Registrar shall on the basis of documents and information filed for the formation of a company, shall register the aforesaid documents and information and issue a certificate that the company is incorporated in the prescribed form to the effect that the proposed company is incorporated under this Act.

Section 7 (3) further provides that on and from the date of incorporation mentioned in the certificate of incorporation the Registrar shall allot to the company a Corporate Identification Number(CIN) which shall be the distinct identity of the company and which shall also be included in the certificate of incorporation. The company becomes a legal entity from the date mentioned in the certificate of incorporation and continues to be so till it is wound up.

Commencement of Business: In terms of section 11 (1) a company having a share capital cannot commence any business or exercise borrowing power unless:

(a) A declaration is filed, by a director in such form and verified in such manner as may be prescribed, with the Registrar that every subscriber to the Memorandum has paid the
amount in respect of the paid up value of shares agreed to be taken by him and that the paid up capital of the company is not less than ₹ 5 Lakhs in case of a public company and ₹ 1 Lakh in case of a private company, as on the date of the declaration; and

(b) The company has filed with the Registrar a verification of its Registered Office

Question 25
What are the effects of registration of a company?

Answer
Section 9 of the Companies Act, 2013 provides that, from the date of incorporation mentioned in the certificate of incorporation, such of the subscribers to the Memorandum and all other persons, as may from time to time become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of exercising all the functions of an incorporated company under this Act and having perpetual succession and a common seal, with power to acquire, hold and dispose of property, both movable and immovable, tangible and intangible, to contract and to sue and be sued by the said name.

Accordingly, when a company is registered and a certificate of incorporation is issued by the Registrar, three important consequences follow:

(i) The company becomes a distinct legal entity. Its life commences from the date mentioned in the certificate of incorporation, capable of entering into contracts in its own name, acquiring, holding and disposing of property of any nature whatsoever and capable of suing and being sued in its own name.

(ii) It acquires a life of perpetual existence by the doctrine of succession. The members may come and go, but it goes on forever, unless it is wound up.

(iii) Its property is not the property of the shareholders. The shareholders have a right to share in the profits of the company as and when declared either as divided or as bonus shares. Likewise any liability of the company is not the liability of the individual shareholders.

Question 26
Though six out of seven signatures to the Memorandum of Association of a company were forged, the company was registered and the Certificate of Incorporation was issued. Can the registration of the company be challenged subsequently on the ground of forged signatures?

Or

The Memorandum of Association of a company was signed by two adult members and by a guardian of the other five minor members, the guardian signing separately for each minor member. The Registrar registered the company and issued under his hand a Certificate of Incorporation. The plaintiff contended that (a) conditions of registration were not duly complied with, and (b) that there were no seven subscribers to the Memorandum. Will the Court uphold his contention?

© The Institute of Chartered Accountants of India
Answer

Yes, (being a fundamental right under the Constitution of India to go for legal proceedings) the registration of the company can be challenged but it will not in any way affect or cancel the registration of the company and the Memorandum and Articles.

Section 10 (1) of the Companies Act, 2013 states that subject to the provisions of the Act, the Memorandum and Articles shall, when registered, bind the company and the members thereof, to the same extent as if they respectively had been signed by the company and by each member, and contained covenants on its and his part to observe all the provisions of the Memorandum and of the Articles.

Question 27

Mr. Ram Lal and his friend desire to incorporate a Public Company and approach you for help. Advise.

Answer

1. Mr Ram Lal and his friend must first get a minimum of 7 persons who are willing to form a company with them and subscribe to the capital.

2. An application for name of the proposed company should be made by giving at least 3 options. This application must be made in the prescribed manner along with the requisite fee.

3. The next steps will be taken only after the name is received from the Registrar. This name will be used in all other documents which will have to be filed for registration of the company.

4. The Memorandum and Articles of association should be drafted in the manner required by the Companies Act, 2013. The Memorandum lays down the constitution of company defining the limits within which it can operate while the Articles lay down the rules and regulations for the running of the company within the constitutional framework laid down by the Memorandum.

5. The Memorandum and Articles should be signed by at least 7 subscribers as the company proposed is a public company

6. The consent of director in prescribe forms should be taken.

7. The state in which the Registered Office of the company will be located must be mentioned in the Memorandum. Thereafter the full address of the Registered Office of the company duly verified must be filed with the Registrar before it can commence its business or borrow money under section 11(1)(b).

8. All the above documents along with the other prescribed document must be filed with the Registrar along with applicable fee.
9. On receipt of all documents the Registrar will if satisfied, issue a certificate of incorporation and the company will come into existence from the date mentioned in such certificate.

**Question 28**

The Articles of a Public Company clearly stated that Mr. A will be the solicitor of the company. The company in its general meeting of the shareholders resolved unanimously to appoint B in place of A as the solicitor of the company by altering the articles of association. Examine, whether the company can do so? State the reasons clearly.

**Answer**

According to Section 10(1) of the Companies Act, 2013, the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by the company and by each member and contained covenants on its and his part to observe all the provisions of the memorandum and articles.

Further, under Section 14 (1) subject to the provisions of this Act and to the conditions contained in the Memorandum, a company may, by a special resolution, alter its Articles.

Moreover, under section 14 (2) the company will be required to file within fifteen days the altered Articles with the Registrar along with necessary documents, such as the copy of the special resolution etc, and in such manner as may be prescribed. On receipt of all documents the Registrar shall register the same.

Section 14 (3) further provides that any alterations in the Articles on registered will be valid as if they were in the original Articles.

In the present case, the company has altered the Articles by a unanimous resolution of the members passed at a general meeting. Hence, the alteration is valid and after registration of the altered Articles, the appointment of B will stand and A will be terminated.

**Memorandum of Association**

**Question 29**

Explain fully the doctrine of Ultravires and state its implications.

Or

Briefly explain the doctrine of “ultravires” under the Companies Act, 2013. What are the consequences of ultravires acts of the company?

**Answer**

The objects for which a company is formed are laid down in the Object Clause of the Memorandum of Association. These objects define the limits of activities of the company and as a legal entity a company cannot operate outside the ambit defined in its objects clause in...
6.23 Business Law, Ethics and Communication

the Memorandum. The objects clauses are classified into Main objectives and other objectives. A company therefore, is empowered to do only such acts which are:

(a) within the framework of the Memorandum i.e. stated in clear terms in the objects clause in the Memorandum of Association of the company, or

(b) reasonably and fairly incidental to the attainment of its main objects, or

(c) which are otherwise authorised by the Companies Act.

If the company does any act which is not covered under the above three categories, such acts shall be beyond the power of the company and shall be declared *ultravires* the Memorandum of the Company. The term *ultravires* means "beyond the powers".

A company being an artificial legal person cannot operate outside the powers given to it in its objects clause and any contract which is ultra vires shall be *void ab initio*.

The decisions given in the following leading cases, have proved the point in question, that ultra vires acts of the company are void and inoperative wholly. The cases are:

(1) *Ashbury Railway Carriage and Iron Co. Ltd. V. Riche* (1875)

(2) *Re German Date Coffee Co.* (1882)

(3) *Egyptian Salt Co. v. Port said Salt Association* (1931)

**Implications of ultra vires Acts:**

The implications of ultra vires contracts are as under:

1. Neither party can enforce the contract

2. It is an established legal requirement that persons entering into contracts with the company must satisfy themselves that the terms of the same are within the powers of the company and not ultra vires.

3. There is no claim on the part of any party to enforce an ultra vires contract nor can he claim any compensation.

4. There is no personal liability on the part of the directors of the company unless they have represented an ultra vires contract fraudulently as a permissible one.

**Question 30**

X, a chemical manufacturing company distributed 20 lacs (₹ Twenty Lacs) to scientific institutions for furtherance of scientific education and research. Referring to the provisions of the Companies Act, 2013 decide whether the said distribution of money was "Ultra vires" the company?
Answer

Distribution of Rupees Twenty Lacs by a company engaged in Chemical manufacturing is not 'Ultravires' since it was conducive to the continued growth of the company as chemical manufacturers (Evans vs Brunner, Mood & Co. Ltd. 1921). In order for a contract to be ultravires, it would be essential to refer to its objects clause. Restrictions of the type mentioned in the question are not an item of the Objectives Clause. Hence, the issue of ultra vires does not arise to such a donation.

Alteration of the Memorandum

Question 31

The Directors of a company registered and incorporated in the name “Mars Textile India Ltd.” desire to change the name of the company entitled “National Textiles and Industries Ltd.” Advise as to what procedure is required to be followed under the Companies Act, 2013?

Answer

Change in the name of company: In the first instance, Mars Textile India Ltd., should ascertain from the Registrar of Companies whether the proposed name viz. National Textiles and Industries Ltd. is available or not. For this purpose, the company should file the prescribed Form No.1A with the Registrar along with the necessary fees. The Registrar after examination will inform whether the new name is available or not for registration.

In case the name is available, the company has to pass a special resolution approving the change of name to National Textiles and Industries Ltd. Thereafter the approval of the Central Government should be obtained as provided in Section 13(2) of the Companies Act, 2013. The power of Central Government in this regard has been delegated to the Registrar of Companies. Thus, the company has to file an application along with the prescribed filing fee for change of name. The change of name shall be complete and effective only on the issue of a fresh certificate of incorporation by the Registrar. The Registrar shall enter the new name in the Register in place of the former name 13(3). The change of name shall not affect any rights or obligations of the company and it shall not render defective any legal proceedings by or against it.

Question 32

Explain the procedure for change of name of a company, as provided in the Companies Act, 2013.

Answer

Procedure for the Change of name under the Companies Act, 2013:

According to Section 13 (1) of the Companies Act, 2013, a company may, by special resolution, and after complying with the procedure specified in this section alter the provisions of its Memorandum.
The Name Clause in the Memorandum states the name of the company. It can be changed in the following manner:

a. Passing of the Special Resolution of members at a duly convened general meeting;
b. Hence, in order to convene the general meeting it will be preceded by a Board Meeting;
c. The change in name must be in accordance with the provisions of Section 4 (2) and (3). These sub sections prohibit a company from registering with a name similar to an existing company’s name or with names listed as undesirable by the Act.
d. After the approval of members the approval of the Central Government, must also be obtained.
e. The approval of the Central Government shall not be necessary when the name change is merely to delete or add the word “Private” before the word “Limited” in the name consequent upon conversion of the company from a public to a private company or vice versa;
f. The documents are required to be filed with the Registrar, who will then register the new name in place of the old name of the company and issue a fresh certificate of incorporation in the new name;
g. The new name will be effective only on and from the date of issue of the new certificate of incorporation by the Registrar as above.

Question 33

Explain the steps to be taken by a company for transfer of its registered office from one State to another?

Answer

Procedure for shifting registered office from one state to another:

The Memorandum of a company includes a clause “Registered Office” which states the state in which the registered office of the company is situated.

Section 13 (1) of the Companies Act 2013, allows a company to change any of the clauses of its Memorandum by a special resolution of its members. In some cases the additional approval of the Central Government is necessary.

In order to change its registered office from one State to another the Companies Act, 2013 lays down the following steps and procedure:

1. Resolution of the Board of Directors: The first step in changing registered office is that the board of directors must adopt a resolution to that effect and convene a general meeting of members in which the change is approved.
2. Special resolution: A special resolution must be passed by the company in the general body meeting of shareholders/members. [Section 13 (1)].
3. **Approval of the Central Government**: Under section 13 (4) the alteration of the Memorandum relating to the change of the registered office from one state to another shall not have any effect, unless it is approved by the Central Government on an application in such form and in such manner as may be prescribed. Hence, the company will have to make the required application after the name is approved by the members by special resolution;

4. **Disposal of application**: Under section 13 (5) the Central Government shall dispose of the application within 60 days and before passing its order, it may satisfy itself that the alteration has the consent of creditors, debenture holders and other persons concerned with the company, or that adequate provisions have been made by the company either for the due discharge of their liabilities or adequate security has been provided for such discharge.

5. **Registration with Registrar**: Under section 13 (7) the company shall file a certified copy of the Central Government order approving the alteration with the Registrar of each of the States within such time and in such manner as may be prescribed, who shall register the same. The Registrar of the State where the registered office is being shifted to, shall issue a fresh certificate of incorporation indicating the alteration.

**Question 34**

*M/s ABC Ltd. a company registered in the State of West Bengal desires to shift its registered office to the State of Maharashtra. Explain briefly the steps to be taken to achieve the purpose.*

*Would it make a difference, if the Registered Office is transferred from the Jurisdiction of one Registrar of Companies to the jurisdiction of another Registrar of Companies within the same State?*

Or

*VD Company Ltd. is registered in Tamil Nadu within the jurisdiction of the Registrar of Companies, Chennai. The company proposes to shift its registered office to a place within the jurisdiction of Registrar of Companies, Coimbatore. State the steps to be taken by the company to give effect to the proposed shifting of its registered office.*

**Answer**

**Transfer of Registered Office of a Company**: The change in the address of the registered address of a company requires an alteration to its Memorandum which is covered under section 13 of the Companies Act 2013.

In order to shift the registered office from the State of West Bengal/Tamil Nadu to the State of Maharashtra/Coimbatore, M/s ABC Ltd./VD Company Ltd. has to take the following steps:

(i) To hold a Board Meeting for the purpose of calling a general meeting of the members of the company in which the shifting of the registered office from West Bengal/Tamil Nadu to Maharashtra/Coimbatore will have to be approved;
The general meeting of the members will have to pass a special resolution approving the change of address of the registered office from West Bengal/Tamil Nadu to Maharashtra/Coimbatore as required by section 13 (1) of the Companies Act 2013.

Make an application to the Central Government in such form and manner as may be prescribed, for getting its approval under section 13 (4) of the Companies Act 2013.

Under section 13 (7) of the Companies Act 2013, where an alteration of the Memorandum results in the transfer of the registered office of the company from one state to another, a certified copy of the order of the Central Government approving the alteration shall be filed by the company with the registrar of each of the states, within such time and in such manner as may be prescribed, and the registrars shall register the same. The registrar of the state where the registered office is being shifted to, shall issue a fresh certificate of incorporation indicating the alteration. In the present case, it will be the registrars of both West Bengal/Tamil Nadu to Maharashtra/Coimbatore.

The change in name will be effective only after the issue of the fresh certificate of incorporation by the Registrar of the state where the registered office is being shifted to, Maharashtra in this case.

Change of registered office from the jurisdiction of one Registrar to the other Registrar within the same State: A change of registered office from the jurisdiction of one registrar to another does not involve an alteration to the Memorandum of a company as the location clause in the Memorandum merely states the name of the state, which is not changed by such relocation. Hence, the provisions of section 13 which deals with the alteration of the Memorandum do not apply.

However, according to section 12 (5) of the Companies Act, 2013 except on the authority of a special resolution passed by a company, the registered office of the company shall not be changed from one city or town to another within the same state. In case of change of the registered office from the jurisdiction of one registrar to another such change must be confirmed by the Regional Director also, on an application made in this behalf by the company. He shall certify the registration within a period of thirty days from the date of filing of such confirmation. The certificate shall be conclusive evidence that all the requirements of this Act with respect to change of registered office have been complied with and the change shall take effect from the date of the certificate. [Section 12(6) & (7)]

Question 35

XY Ltd. has its registered office at Mumbai in the State of Maharashtra. For better administrative conveniences the company wants to shift its registered office from Mumbai to Pune (State of Maharashtra). What formalities the company has to comply with under the provisions of the Companies Act, 2013 for shifting its registered office as stated above? Explain.
Question 36
State with reason, whether the following statement is correct or incorrect, according to the Companies Act, 2013.
Change of Registered Office of Company from one place to another within a State requires confirmation by the Central Government.

Answer
Incorrect. A change in the location of its registered office by a company from one place to another within the same state does not result in the alteration of its Memorandum and hence the provisions and requirements under section 13 of the Companies Act, 2013 will not apply.

Question 37
What is the importance of registered office of a company? State the procedure for shifting of registered office of the company from one State to another State under the provisions of the Companies Act, 2013

Answer
Importance of registered office:
- The importance of the registered office of a company is clearly established in two sections of the Companies Act, 2013. Section 11(1)(b) states that a company having
share capital shall not commence business or exercise any borrowing powers unless it has filed with the registrar a verification of its registered office as required by section 12 (2) which requires every company to furnish to the registrar a verification of its registered office within a period of 30 days of its incorporation in such manner as may be prescribed.

Further, section 12 (1) states that a company shall, on and from the fifteenth day of its incorporation and at every time thereafter, have a registered office capable of receiving and acknowledging all communications and notices addressed to it.

Section 12 (3) further requires every company to:

- Paint or affix its name and address of its registered office, and keep the same painted and affixed, on the outside of every office or place in which its business is carried on. Such display must be in a conspicuous position, in legible letters in characters and letters of the local language in addition to any other language (if chosen by the company);
- Get its name, address of its registered office and the corporate identity number and other details, on all its business letters, bill heads, notices and other official publications;

From the above provisions of the Companies Act 2013, the extremely high importance of the registered office of a company can be well understood as it serves as the location where:
(a) necessary documents may be served upon, or deposited; (b) notices, letters, etc., may be issued; (c) inspection may be done; and (d) communication may be made. The domicile and the nationality of a company is determined by the place of its registered office. This is also important for determining the jurisdiction of the Court governing it.

Notice of the situation of the registered office and of every change therein must be sent to the Registrar (otherwise than through a statement as to the address of the registered office in the annual report) within 30 days of the date of incorporation and the date of change. This provision is designed to locate the spot where the records of the company could be inspected and where the letters should be addressed and notices served upon the company.

Procedure for shifting the registered office from one state to another state (Section 13, of the Companies Act, 2013):

In order to shift the registered office from one state to another the following procedure will have to be followed:

(i) Hold a Board Meeting for the purpose of calling a general meeting of the members of the company in which the shifting of the registered office from one state to another will have to be approved;
(ii) The general meeting of the members will have to pass a special resolution approving the change of address of the registered office from one state to another as required by section 13 (1) of the Companies Act 2013.

(iii) Make an application to the Central Government in such form and manner as may be prescribed, for getting its approval under section 13 (4) of the Companies Act 2013.

(iv) Under section 13 (7) of the Companies Act 2013, where an alteration of the Memorandum results in the transfer of the registered office of the company from one state to another, a certified copy of the order of the Central Government approving the alteration shall be filed by the company with the registrar of each of the states, within such time and in such manner as may be prescribed, and the registrars shall register the same. The registrar of the state where the registered office is being shifted to, shall issue a fresh certificate of incorporation indicating the alteration.

(v) The change in name will be effective only after the issue of the fresh certificate of incorporation by the Registrar of the state where the registered office is being shifted to.

Question 38

The object clause of the Memorandum of Association of LSR Private Ltd, Lucknow authorized it to do trading in fruits and vegetables. The company, however, entered into a Partnership with Mr. J and traded in steel and incurred liabilities to Mr. J. The Company, subsequently, refused to admit the liability to J on the ground that the deal was ‘Ultra Vires’ the company. Examine the validity of the company’s refusal to admit the liability to J. Give reasons in support of your answer.

Answer

In terms of section 4(1)(c) of the Companies Act, 2013, the powers of the company are limited to:

(i) Powers expressly given in the “Objects Clause” of the Memorandum (which is popularly known as ‘express’ power), or conferred by the Companies Act, or by any other statute and

(ii) powers reasonably incidental or necessary to the company’s main objects (termed as ‘implied’ powers).

The Act further provides that the acts beyond the powers of a company are ultra vires and void and cannot be ratified even though every member of the company may give his consent [Ashbury Railway Carriage Company Vs Richee]

The objects clause enables the shareholders, creditors or others to know what its powers are and what is the range of its activities. The objects clause therefore is of fundamental importance to the share holders, creditors and every other person who deals with the company in any manner what so ever. A company being an artificial legal person can act only within the ambit of the powers conferred upon it by the Memorandum through the “Objects Clause”.

© The Institute of Chartered Accountants of India
Every person who enters into a contractual relationship with a company on any matter is presumed to be aware of its objects and is supposed to have examined the Memorandum of Articles of the company to ensure proper contractual agreement. If a person fails to do so, it is entirely at his own peril.

It is also pertinent to note that the objects of a company may be changed by following the provisions for the change of Memorandum as laid out in section 13 of the said Act.

M/s LSR Pvt. Ltd is authorised to trade directly on fruits and vegetables. It has no power to enter into a partnership for iron and steel with Mr. J. Such act cannot be treated as being within either the ‘express’ or ‘implied’ powers of the company. Mr J who entered into partnership is deemed to be aware of the lack of powers of M/s LSR (Pvt) Ltd. In the light of the above, Mr J cannot enforce the agreement or liability against M/s LSR Pvt Ltd under the Companies Act. Mr J should be advised accordingly. This conclusion is supported by the decision reported in the case of the ‘Ganga Mata Refinery Company (Pvt) Ltd CIT’.

However, under the Indian Contract Act, 1872 where a person derives any benefit either in the absence of a contract or under a void agreement, will be liable to make a reasonable payment for the value of such benefit. (Please refer to Quasi Contracts and Void Agreements)

Question 39

The Memorandum of Association of a company was presented to the Registrar of Companies for registration and the Registrar issued the certificate of incorporation. After complying with all the legal formalities a company started a business according to the object clause, which was clearly an illegal business. The company contends that the nature of the business cannot be gone into as the certificate of incorporation is conclusive. Answer the question whether company’s contention is correct or not.

Answer

Section 3 of the Companies Act states that a company may be formed for any lawful purpose by 7 or more persons in case of public company, 2 or more persons in case of private company and 1 person in case of a one person company. Hence, a company cannot be formed for an unlawful purpose or for carrying on illegal business.

Section 9 of the Act further provides that from the date of incorporation mentioned in the certificate of incorporation, such subscribers to the memorandum and all other persons, as may from time to time, become members of the company, shall be a body corporate capable of exercising all the functions of an incorporated company under this Act. Under this Act a company can be formed for a lawful purpose. Hence, a company cannot be formed in the first place for an illegal business activity.

In the present case the Registrar was at fault in issuing the certificate of incorporation but the issue of the certificate of incorporation does not give the company the right to do illegal business.
On applying the above provisions in the present problem, the company’s contention is wrong. Though a certificate of incorporation is a conclusive evidence of its formation and existence, it does not render its illegal objectives as legal. In *Bowman v. Secular Society Ltd.*, the court held that the statute does not provide that all or any of the objects specified in the memorandum, if otherwise illegal, would be rendered legal by the certificate. Therefore, the contention of the company that the nature of business cannot be gone into after the certificate of incorporation has been obtained is not tenable. Moreover, the illegality of its objects is adequate grounds for the Registrar to rectify his gross mistake and suo motto take necessary steps to cancel the certificate of incorporation.

**Question 40**

*What are the purposes for which “objects” can be altered by a company under the Companies Act, 2013? Briefly explain the procedure to be applied to such matters.*

*Or*

*State the purposes for which the object clause of the Memorandum of Association of a public limited company, registered under the Companies Act, 2013, can be altered.*

*Or*

*Explain the provisions of law and procedure relating to alteration of object clause stated in the Memorandum of Association of a company under the Companies Act, 2013.*

*Or*

*The management of Ambitious Properties Ltd., has decided to take up the business of food processing activity because of the downward trend in real estate business. There is no provision in the object clauses of the Memorandum of Association to enable the company to carry on such business. State with reasons whether its object clause can be amended. State briefly the procedure to be adopted for change in the object clause.*

**Answer**

**Alteration of Objects**

The Companies Act, 2013 has made alteration of the memorandum simpler and more flexible. Under section 13 (1) of the Act a company may, by a special resolution any after complying with the provisions of section 13, alter the provisions of its Memorandum. In the case of alteration to the objects clause, the sub section (6) of Section 13 requires the filing of the Special Resolution by the company with the Registrar. Section 13 (9) states that the Registrar shall register any alteration to the Memorandum with respect to the objects of the company and certify the registration within a period of thirty days from the date of filing of the special resolution by the company. Section 13 (10) further stipulates that no alteration in the Memorandum shall take effect unless it has been registered with the Registrar as above.

Hence, the Companies Act now permits any alteration to the objects clause with ease.
Procedure
Companies are now under liberty to alter the object clause of the memorandum of association with just the approval of its members by a special resolution without obtaining further approval from Central Government or any other authority. The procedure may be elaborated as under:

a) Holding a Board Meeting for the purpose of convening the meeting of members for approving the alteration in objects clause by a special resolution;

b) Approving the alteration to the objects clause by passing a special resolution in general meeting of members.

c) Filing of the special resolution with the Registrar of Companies

d) Registration of the alteration to be done by the Registrar within one month from the date of filing of the special resolution along with a printed copy of the memorandum as altered

Question 41
A company was started with the object of building ‘A mall with shops’. The building was destroyed by fire and the company wanted to alter the objects clause in the memorandum by substituting the words ‘A mall with shops’ with the words “Shops, Residential buildings and Warehouses for letting purposes.’ Will this alteration of the memorandum for the purpose be permissible? Decide referring to the provisions of the Companies Act, 2013.

Answer
Alteration of objects: Under section 13 (1) of the Companies Act, 2013 the alteration to the Memorandum is permissible now without restriction and only with the approval of members through a special resolution duly registered with the Registrar. Hence, the proposed alteration is permissible.

Question 42
Explain the steps to be taken by a company for starting a business for which there is no provision in the objects clause of the Memorandum of Association.

Answer
Section 4 (1) (c) of the Companies Act 2013 clearly provides for the Memorandum to include the objects for which the company is formed. A company is therefore, formed to carry on activities only in line with its objects as defined in the Memorandum. Any act outside the objects clause is termed “ultra vires” and is considered void.

Hence, if a company wishes to start a business which is not provided for in its Memorandum, it must first alter its Memorandum to include that business in its objects clause. This is a simple process defined in section 13 of the Act. It can be done with the approval of the members by a special resolution and the registration of the same with the Registrar.
Question 43

RSP Limited, with a limited liability of its members by guarantee of ₹10 lac to each member. The company increases the liability of the members from ₹10 to 15 lac by an alteration made in the liability clause of the Memorandum of Association. Referring to the provisions of the Companies Act, 2013 decide, whether the members of the company are liable for the increased liability.

Answer

The limitation of liability is an essential clause in the Memorandum and on registration of the company becomes binding on all present and future members.

The present question states that the liability of the members has been increased by the company without clarifying the mode. The company can act only through its Board of Directors or through its members. The Board of Directors do not have the authority to alter the clause; hence it means that the alteration was approved by the members at a general meeting. However, section 13 of the Act which deals with the alteration of the Memorandum does not provide for the alteration of its liability clause. Hence, the liability of members cannot be altered once the company is formed.

The alteration in the given question is therefore invalid.

Articles of Association

Question 44

The Articles of Association of a Limited Company provided that ‘X’ shall be the Law Officer of the company and he shall not be removed except on the ground of proved misconduct. The company removed him even though he was not guilty of misconduct. Decide, whether company’s action is valid?

Answer

Section 5 (1) of the Companies Act, 2013 states that the Articles of a company contain the regulations for the management of a company. Further section 5 (2) provides that the Articles of a company shall contain all matters that are prescribed under the Act and also such additional matters as may be considered necessary for the management of the company.

Removal of Law Officer: The Memorandum and Articles of Association of a company are binding upon company and its members and they are bound to observe all the provisions of memorandum and articles as if they have signed the same [Section 10(1)].

However, the company and members are not bound to outsiders in respect of anything contained in memorandum/articles by which such outsiders have been given any rights. This is based on the general rule of law that a stranger to a contract cannot acquire any right under the contract.
In this case, Articles conferred a right on ‘X’, the law officer that he shall not be removed except on the ground of proved misconduct. In view of the legal position explained above, ‘X’ cannot enforce the right conferred on him by the articles against the company. Hence the action taken by the company (i.e. removal of ‘X’ even though he was not guilty of misconduct) is valid. (*Eley V Positive Govt. Security Life Assurance Co., Major General Shanta Shamsher Jung v Kamani Bros. P. Ltd.*)

However, by altering the Articles by a special resolution under section 14 of the Act and Mr X can be removed.

**Alteration of Articles**

**Question 45**

*Explain the limitations relating to alteration of Articles of Association of a company.*

**Answer**

**Limits on the Alteration of Articles:** Every company has a right to alter its articles by following a simple process laid down in section 14 of the Companies Act, 2013. Generally speaking the right of a company to alter its Articles is without and restriction. However, section 14 of the Act limits the right of the company to alter its Articles by imposing the following restrictions:

(i) The alteration cannot override its Memorandum or in any way conflict with the provisions thereof.

(ii) It cannot not be in violation of any provision of the Companies Act or any other statute.

(iii) It cannot allow an activity which is illegal (as a company can be formed only for a lawful object).

(iv) An alteration to the Articles cannot increase the liability of its member which has been already defined in the Memorandum.

**Doctrine of Indoor management**

**Question 46**

*Explain clearly the doctrine of ‘Indoor Management’ as applicable in cases of companies registered under the Companies Act, 1956. Explain the circumstances in which an outsider dealing with the company cannot claim any relief on the ground of ‘Indoor Management’.*

**Answer**

**Doctrine of indoor Management & Exceptions:** The Memorandum and the Articles of a company once registered are considered to be public documents and available for inspection by any member of the public at the Registered Office of the company. Hence, it assumed that every person dealing with the company has satisfied himself regarding its competence to enter into such contracts. This is known as the doctrine of constructive notice.
The limitation to the doctrine of constructive notice of the Memorandum and Articles of a company is contained in the doctrine of indoor management. According to the doctrine of indoor management, the outsiders, dealing with the company though are supposed to have satisfied themselves regarding the competence of the company to enter into the proposed contracts are also entitled to assume that as far as the internal compliance to procedures and regulations by the company is concerned, everything has been done properly. They are bound to examine the registered documents of the company and ensure that the proposed dealing is not inconsistent therewith, but they are not bound to do more. They are fully entitled to presume regularity and compliance by the company with the internal procedures as required by the memorandum and Articles. This limitation of the doctrine of constructive notice is known as the ‘Doctrine of Indoor Management’, popularly known as the rule laid down in the celebrated case of Royal British Bank v. Turquand. Thus the doctrine of indoor management aims to protect outsiders against the company.

Exceptions: In the following circumstances an outsider dealing with the company cannot claim any relief on the ground of ‘indoor Management’

1. **Knowledge of irregularity:** Where a person dealing with a company has actual or constructive notice of the irregularity as regards internal management, he cannot claim the benefit under the rule of indoor management. *(T.R. PRATT (Bombay) Ltd. v. E.D. Sassoon & Co. Ltd.).*

2. **Negligence:** Where a person dealing with a company could discover the irregularity if he had made proper inquiries, he cannot claim the benefit of the rule of indoor management. The protection of the rule is also not available where the circumstances surrounding the contract- are so suspicious as to invite inquiry, and the outsider dealing with the company does not make proper inquiry *(Anand Bihari Lel v. Dinshaw & Co.)* Also the case of *(Under-Wood v. Bank of Liver Pool).*

3. **Act void ab initio and forgery:** Where the acts done in the name of a company are void ab initio, the doctrine of indoor management does not apply. The doctrine applies only to irregularities that otherwise might affect a genuine transaction.

4. **Acts outside the scope of apparent authority:** If an officer of a company enters into a contract with a third party and if the act of the officer is apparently beyond the scope of his authority, the company is not bound *(Kreditbank Cassel v. Schenkers Ltd.).* For example if a contract for the recruitment of a manager is signed by the Stores Officer, the person cannot claim remedy under the doctrine of indoor management.

**Question 47**

*Briefly explain the doctrine of “Constructive Notice” under the Companies Act, 2013. Are there any exceptions to the said doctrine?*
Answer

Doctrine of Constructive Notice: In consequence of the registration of the memorandum and articles of association of the company with the Registrar of Companies, a person dealing with the company is deemed to have constructive notice of their contents (T.R. Pratt (Bombay) Ltd. v. E.D. Sassoon & Co. Ltd.). This is because these documents are construed as ‘public documents’. Accordingly if a person deals with a company in a manner incompatible with the provisions of the aforesaid documents or enters into transaction which is ultra vires these documents, he must do so at his peril.

The doctrine of constructive notice is not a positive one but a negative one like that of estoppeles of which it forms parts. It operates only against the person who has been dealing with the company but not against the company itself; consequently he is prevented from alleging that he did not know that the constitution of the company rendered a particular act or a particular delegation of authority ultra vires.

There is one limitation to the doctrine of constructive notice of the Memorandum and the Articles of a company. The outsiders dealing with the company are on their part entitled to assume that as far as the internal proceedings of the company are concerned, everything has been done properly in accordance with the Memorandum and Articles and the Act. They are only bound to read the registered documents and satisfy themselves that the proposed dealing is not inconsistent therewith, but are not bound to do more; they need not inquire into the regularity of the internal proceedings as required by the Memorandum and the Articles. This limitation of the doctrine of constructive notice is known as the ‘doctrine of indoor management’ or the rule laid down in the celebrated case of Royal British Bank v. Turquand.

Thus, whereas the doctrine of constructive notice protects the company against outsiders, the doctrine of indoor management seeks to protect outsiders against the company.

Question 48

Explain the doctrine of ‘Indoor management’ in brief.

The Secretary of a Company issued a share certificate to ‘A’ under the Company’s seal with his own signature and the signature of a Director forged by him. ‘A’ borrowed money from ‘B’ on the strength of this certificate. ‘B’ wanted to realise the security and requested the company to register him as a holder of the shares. Explain whether ‘B’ will succeed in getting the share registered in his name.

Answer

The doctrine of Indoor Management is laid down in the Royal British Bank vs. Turquand (1956) 6E&B 327 case in which the directors of RBB (Royal British Bank) gave a bond to one T (Turquand) without the required resolution being passed. The Articles empowered the directors to issue such bonds under the authority of a proper resolution. In fact no such resolution was passed. It was decided in the case that notwithstanding the non passing of the required resolution, T could sue on the bonds on the ground that he was entitled to assume that the resolution had been duly passed. Thus the persons dealing with the company are...
entitled to assume that the acts of the directors or the officers of the company are validly performed, if they are within the scope of their apparent authority.

However, this doctrine is not applicable where the person dealing with the company has notice of irregularity or when an instrument purporting to be enacted on behalf of the company is a forgery.

In the instant problem the doctrine of indoor management will not apply as the certificate is a forgery which does not give a good title to A and thereby to B. The title of the buyer cannot be better than that of the seller (Sale of Goods Act, 1930). Hence, ‘B’ will not succeed in getting the share registered in his name.

Question 49

A Managing Director of a company borrowed a sum of money by executing a document in which he forged the signature of two other directors who are required to sign as per requirements of articles. Can the company deny liability to creditors?

Answer

In Ruben v. Great Fingall Consolidated, it was held that Doctrine of Indoor Management could not be extended to cases of forgery. Transaction effected by forgery is void ab initio. However, in Sri Krishan v. Mondal Bros. & Co. it was held that a company may be held liable for any fraudulent Acts of its officers acting under ostensible authority. Therefore, in the instant case, company will not be allowed to deny liability in order to defeat bona fide claims of the creditor.

Preliminary/Pre-Incorporation Contracts and Provisional Contracts

Question 50

Explain the legal validity of Preliminary Contracts entered into by a company?

Answer

Preliminary or pre incorporation Contracts are those contracts which are entered into before the formation of the company by its promoters acting on its behalf. The Companies Act 2013 does not lay down any provisions relating to pre incorporation contracts. Hence, such contracts can be entered into by the promoters in their own names. If entered into in the name of the company, such contracts will be void as on the date of contract, the company not being in existence is not competent to contract and under the Indian Contract Act, 1872 such a contract will be void. Pre incorporation contracts cannot also be ratified when the company is formed as the same are void to begin with. The company not being in existence cannot also appoint promoters as agents to act on its behalf.

Question 51

Distinguish between “pre-incorporation contracts” and “provisional contracts” under the Companies Act, 2013.
Answer

Pre-incorporation vs. Provisional Contracts: Following are the points of distinction between Pre-incorporation contracts and Provisional-contracts:

<table>
<thead>
<tr>
<th>Basis of differences</th>
<th>Pre-incorporation Contracts</th>
<th>Provisional contracts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Meaning</td>
<td>Contracts which are entered into, by the persons proposing to float a company in the name of the prospective company before it has come into existence.</td>
<td>Contracts which are entered into by a company after obtaining the Certificate of Incorporation but before it becomes eligible to commence business under section 11 of the Companies Act.</td>
</tr>
<tr>
<td>Nature &amp; consequences</td>
<td>Contracts are void ab initio as the company is not in existence and hence cannot enter into a contract either in its own name or through agents. A company is neither bound by nor can it enforce a pre-incorporation contracts nor can it ratify the same after incorporation as being non existent it cannot appoint agents on its behalf.</td>
<td>Contract shall be binding upon the company from the date on which the company is entitled to commence business.</td>
</tr>
<tr>
<td>Execution</td>
<td>As the company is not in existence, so company is neither bound by nor can it enforce a pre-incorporation contracts nor can it ratify the same after incorporation.</td>
<td>Contracts entered into by a company after its incorporation and before it is entitled to commence business are provisional only and are not binding on the company until the trading company completes the added formalities under section 11 (1) (a) and (b).</td>
</tr>
</tbody>
</table>

Question 52

Pick out the correct answer from the following and give reasons:

(i) Contracts entered into by a company after its incorporation and before it is entitled to commence business are called:

1. provisional contracts
2. pre-incorporation contracts
3. both 1 and 2
4. None of the above.

(ii) The underwriting commission on shares must not exceed:
1. 2.0 percent of the issued price of shares
2. 2.5 percent of the issued price of shares
3. 5.0 percent of the issued price of shares
4. 5.5 percent of the issued price of shares

(iii) Which one of the following required ordinary resolution?
1. to change the name of the company
2. to alter the articles of association
3. to reduce the share capital
4. to declare dividends.

Answer

(i) Provisional Contracts: A company having share capital cannot commence business or borrow moneys until it complies with some added formalities as laid down in section 11 (1) of the Companies Act, 2013. Such contracts are subject to an implied condition that the company will comply with the added formalities. Such contracts are therefore valid only if the company legitimately goes on to commence its business.

(ii) 5.0 percent of the issued price of shares: Reason: As per of the Companies Act, 2013, the amount of commission should not exceed, in the case of shares, 5 percent of the price at which the shares have been issued or the amount or rate authorised by the Articles, whichever is less.

(iii) To declare dividends; Declaration of dividend is one of the ordinary businesses transacted at every Annual General Meeting of the company Members may at an AGM declare dividend by ordinary resolution.

Question 53

XYZ Co. Ltd. was in the process of incorporation. Promoters of the company signed an agreement for the purchase of certain furniture for the company and payment was to be made to the suppliers of furniture by the company after incorporation. The company was incorporated and the furniture was used by it. Shortly after incorporation, the company went into liquidation and the debt could not be paid by the company for the purchase of above furniture. As a result suppliers sued the promoters of the company for the recovery of money.

Examine whether promoters can be held liable for payment under the following situations:

(i) When the company has already adopted the contract after incorporation?
(ii) When the company makes a fresh contract with the suppliers in terms of pre-incorporation contract?

Answer

The present contract has been entered into by the promoters for purchase of furniture. The terms of the contract provide for the payment by the XYZ Co Ltd after it is incorporated. A pre-incorporation contract is not binding on the company as it was not in existence on the date of the contract. Such a contract can also not be entered into by promoters acting as agents of the company as the company not being in existence cannot appoint agents.

Therefore, the contract for the purchase of furniture cannot be binding on the company.

The promoters remain personally liable on a contract made on behalf of a company which is not yet in existence. Such a contract is deemed to have been entered into personally by the promoters and they are liable to pay damages for failure to perform the promises made in the company’s name (Scot v. Lord Ebury), even though the contract expressly provided that only the company shall be answerable for performance.

In Kelner v. Baxter also it was held that the persons signing the contracts viz. Promoters were personally liable for the contract.

Further, a company cannot ratify a contract entered into by the promoters on its behalf before its incorporation. Therefore, it cannot by adoption or ratification obtain the benefit of the contract purported to have been made on its behalf before it came into existence as ratification by the company when formed is legally impossible. The doctrine of ratification applies only if an agent contracts for a principal who is in existence and who is competent to contract at the time of contract by the agent.

The company can, if it desires, enter into a new contract, after its incorporation with the other party. The contract may be on the same basis and terms as given in the pre-incorporation contract made by the promoters. The adoption of the pre-incorporation contract by the company will not create a contract between the company and the other parties even though the option of the contract is made as one of the objects of the company in its Memorandum of Association. It is, therefore, safer for the promoters acting on behalf of the company about to be formed to provide in the contract that: (a) if the company makes a fresh contract in terms of the pre-incorporation contract, the liability of the promoters shall come to an end; and (b) if the company does not make a fresh contract within a limited time, either of the parties may rescind the contract.

Thus applying the above principles, the answers can be as under:

(i) the promoters in the first case will be liable to the suppliers of furniture. There was no fresh contract entered into with the suppliers by the company. Therefore, promoters continue to be held personally liable in this case for the reasons given above.

(ii) in the second case obviously the liability of promoters comes to an end provided the fresh contract was entered into on the same terms as that of pre-incorporation contract.
Promoters

Question 54

Who shall be considered as promoter according to the definition given in the Companies Act, 2013? Explain.

Answer

Promoter- According to section 2 (69) of the Companies Act, 2013, Promoter means a person –

(a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in section 92; or

(b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or

(c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act.

Provided that nothing in sub clause (c) shall apply to a person who is acting merely in a professional capacity.

Exercise

1. XYZ (P) Ltd. was incorporated on January 20, 2009. A similar company with identical name and similar objects was inadvertently incorporated on September 20, 2009. On account of similarity in name and objects, XYZ (P) Ltd filed a petition on January 25, 2010 that the Central Government should direct the company incorporated at a latter date to change its name so that its business interest are protected. State in this connection whether the company incorporated at a later date can be directed by the Central Government to change its name.

[Hints: Yes, Read Section 4(2) and Section 16 of the Companies Act, 2013]

2. The existing number of members in a public limited company is below the requirement as per the Companies Act, 2013. However, the company is continuing its business operations. State the legal consequences arising out of such continuance business.

[Hints: Members who are aware of the fact are personally and severally liable for the whole of the debts contracted]

3. XYZ Ltd., intends to start a new additional business which has no relation to the existing business. State whether it can do so under the provision of the Companies Act, 2013.

[Hints: Yes, as per the provision laid down in Section 13 (8) and (9) of the Companies Act, 2013]

4. M/s ABC Ltd. a company registered in the State of West Bengal desires to shift its registered office to some other place in the same State.
Would it make a difference, if the Registered Office is transferred from the Jurisdiction of one Registrar of Companies to the jurisdiction of another Registrar of Companies within the same State?

[Hints: Yes, as per the Sections 13 of the Companies Act, 2013]

5. The Directors of a Company borrowed ₹ 50,000/- from A on a transaction which is ultra vires the Company. Discuss the rights of A against the Company and its Directors.

[Hints: A does not have any right against the company]

6. Under the Articles, the Directors of a Company had power to borrow upto ₹ 1,00,000 without the consent of the General Meeting. The Directors themselves lent ₹ 2,00,000 to the Company without such consent and took Debentures. Is the Company liable for ₹ 2,00,000.

[Hints: Company is not liable]

7. The management of Kamna Real Estate Ltd. has decided to take up the business of food processing activity because of the downward trend in real estate business. There is no provision in the object clauses of the memorandum of association to enable the company to carry on such business. State whether its object clause can be amended.

[Hints: No, as per Section 13 of the Companies Act, 2013 ]

8. A Managing Director of a Company borrowed a sum of money by executing a document in which he forged the signature of two other directors who are required to sign as per requirements of the articles. Can the Company deny liability to creditors?

[Hints: No, as per the decision given in Sri Kishan v. Mondal Bros. & Co. where it was held that a Company may be held liable for any fraudulent acts of its officers acting under ostensible authority.]
UNIT – 2: PROSPECTUS

Prospectus

Question 1

*Explain the meaning and role of the Prospectus.*

**Answer**

**Meaning of Prospectus:** Section 2(70) of the Companies Act, 2013 defines the term Prospectus as any document described or issued as a prospectus, and includes a red herring prospectus referred to in section 32 or shelf prospectus referred to in section 31 or any notice, circular, advertisement or other document inviting offers from the public for the subscription or purchase of any securities of a body corporate. In this context, it should be noted that prospectus is not an offer in itself but an invitation to make an offer, signifying thereby that on acceptance of such an invitation by any member of the public, no binding contract between him and the company comes into being. Application for purchase of shares or debentures or for making a deposit constitutes an offer by the subscriber to the company and it is only on its acceptance by the company that a binding contract comes into existence.

**Role:** The prospectus is the main document on the basis of which the prospective investors decide whether or not they should subscribe to the securities offered by the company. The information in the prospectus is vital in every material aspect and any misstatements or concealment of material facts may result in huge losses to the investing public. Therefore, the Companies Act vide section 34 and 35 of the Companies Act, 2013 imposes both criminal liability and civil liability for untrue and misleading statements in the prospectus.

**When Prospectus is not required to be issued?**

**Question 2**

*State the conditions where under the issuing of prospectus is not necessary under the provisions of the Companies Act, 2013.*

**Answer**

**Non-issuing of Prospectus:**

Under section 23 (1) of the Companies Act, 2013 no company can issue securities of any nature to the public except through a prospectus. Further under section 25 of the Act any document, by which the offer for sale of securities of the company is made to the public such document, shall be deemed to be a prospectus issued by the company. Hence, in case of public issue of securities there is no situation under which a company can dispense with the issue of a prospectus as any document offering the sale will be deemed to be a prospectus.

However, the issue of prospectus is not necessary in the following exceptional cases—
Where a company makes a private placement through issue of a private placement letter in terms of section 42 of the Companies Act, 2013

Where securities are offered to existing holders of such securities under a rights issue or a bonus issue in accordance with the provisions of this Act.

Requirements as to the issue of Prospectus

Question 3

What are the requirements as to the issue of the Prospectus?

Answer

Comprehensive rules and regulations have been incorporated into the Companies Act, 2013 in respect of this basic document which is the only source of vital information for the investors to ascertain the soundness or otherwise of the company. Since the prospectus is intended to save the investing public from victimisation, the Legislature has aimed at securing the fullest disclosure of all material and essential particulars and laying the same before all the prospective buyers of shares and imposing stringent liabilities for violations.

Briefly the rules and regulations are as follows:

(i) **Matters to be stated in a Prospectus** – In order to provide a thorough and comprehensive information on all aspects of the company and the proposed issue, section 26 (1) of the Companies Act, 2013 lists down a large list of items that must be stated in the Prospectus.

(ii) **Registration of prospectus** – Section 26 (4) provides that no prospectus shall be issued by or on behalf of a company or in relation to an intended company, unless on or before the date of its publication, there has been delivered to the Registrar for registration, a copy thereof signed by every person or his duly authorized representative, who is named therein as a director or proposed director of the company.

Under sub section (7) it is provided that the Registrar shall not register the prospectus unless the requirements for registration under section 26 are complied with and the prospectus is accompanied by the consent of all the persons named in the prospectus.

(iii) **Approval of prospectus by various agencies**: The draft prospectus has to be approved by various agencies before it is filed with the ROC of the concerned State.

(iv) **The lead financial institution underwriting the issue, if applicable**: The draft prospectus is vetted by SEBI to ensure adequacy of disclosures. However, vetting by SEBI does not amount to approval of prospectus. SEBI does not take any responsibility for the correctness of the statements made or opinions expressed in the prospectus.
Abridged form of Prospectus

Question 4

What is meant by “Abridged Prospectus”? Is it necessary to furnish abridged form of prospectus along with the application form for shares? Under what circumstances an abridged prospectus need not accompany the detailed information regarding prospectus along with the application form?

Answer

(1) **Meaning of Abridged Prospectus:** According to Section 2(1) of the Companies Act, 2013, an abridged prospectus means a memorandum containing such salient features of a prospectus as may be specified by the SEBI by making regulations in this behalf.

(2) **Abridged prospectus to be issued along with application form:** Section 33 (1) of the Companies Act, 2013 states that no application form for the purchase of any of the securities of a company can be issued unless such form is accompanied by an abridged prospectus. The abridged prospectus and application form should bear the same printed number. The investor may detach the share application form along the perforated line, after he has had an opportunity to study the contents of this abridged prospectus.

The objective of the abridged prospectus is to reduce the cost of issue as the detailed prospectus is a very bulky document whereas the contents of abridged prospectus are limited. However, under sub section (2) a copy of the prospectus shall, on a request by any person before the closing date of the subscription list and the offer, be furnished to him.

Penalty for failure to comply with sub section (3) can be a fine of up to ₹ 50,000 for each fault.

(3) **Circumstances under which the abridged prospectus need not accompany the application forms:** In terms of the Proviso to section 33 (1) an abridged prospectus need not accompany the application form if it is shown that the form of application was issued:

(i) In connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to such securities ; or

(ii) Where the securities are not offered to the public.

Statement by Experts

Question 5

What is the extent of liability of an expert, in relation to publication of prospectus, for any mis-statement in the report given by him?
Answer

An expert in terms of section 2 (38) of the Companies Act, 2013 has the professional qualification and the requisite expertise, power and authority to issue a certificate or a statement in a prospectus. Since, a prospectus is the key document based on which the prospective investors make their investment in the issue of securities of the company, it is very critical that statements made are authentic and correct.

The liability of an expert for mis-statements made by him in the prospectus is covered in sections 34 and 35 of the Act. While section 34 lays down the criminal liability, section 35 provides for a civil liability. The liabilities apply to both the company and other persons.

Section 34 of the Companies Act 2013 states that where a prospectus, issued, circulated or distributed under this Chapter, includes any statement which is untrue or misleading in form or context in which it is included or where any inclusion or omission of any matter is likely to mislead the reader, then every person who authorises the issue of such prospectus shall be liable under section 447. Section 447 says that any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months (in case of public interest, the term of imprisonment shall not be less than three years) but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud:

Provided that nothing in this section shall apply to a person if he proves that such statement or omission was immaterial or that he had reasonable grounds to believe, and did up to the time of issue of the prospectus believe, that the statement was true or the inclusion or omission was necessary.

Under section 35 where a person has subscribed for securities of a company acting on any statement included, or the inclusion or omission of any matter, in the prospectus which is misleading and has sustained any loss or damage as a consequence thereof, then the company and every person defined in this section including an expert, shall, without prejudice to any punishment to which he may be liable under section 36, be further liable to pay compensation to every person who has sustained such loss or damage.

Shelf Prospectus

Question 6

Explain the concept of “Shelf Prospectus” in the light of Companies Act, 2013. What is the law relating to issuing and filing of such prospectus?

Or

When is a company required to issue a 'shelf prospectus' under the provisions of the Companies Act, 2013? Explain the provisions of the Act relating to the issue of 'shelf prospectus' and filing it with the Registrar of Companies.
Answer

Shelf Prospectus: Section 2 (70) of the Companies Act, 2013 defines a “Prospectus” and includes a red herring prospectus and a shelf prospectus within the definition of “Prospectus”. Further the explanation to section 31 of the Companies Act, 2013 defines a shelf prospectus as a prospectus in respect of which the securities or class of securities included therein are issued for subscription in one or more issues over a certain period without the issue of a further prospectus.

Section 31 of the Act states that any class or classes of companies, as the Securities and Exchange Board may provide by regulations in this behalf, may file a shelf prospectus with the Registrar at the stage of the first offer of securities included therein which shall indicate a period not exceeding one year as the period of validity of such prospectus which shall commence from the date of opening of the first offer of securities under that prospectus, and in respect of a second or subsequent offer of such securities issued during the period of validity of that prospectus, no further prospectus is required.

From the above, the key features of a shelf prospectus are as under:

a. A shelf prospectus is a prospectus; hence it must comply with all the provisions of Section 26 of the Act which lays down the matters to be included in a prospectus and filing of the same with the Registrar. It must also comply with the other relevant and applicable sections of the Act to a prospectus.

b. A shelf prospectus may be issued by a class of companies only if and subject to the regulations of SEBI;

c. A shelf prospectus can have a validity of a maximum period of one year during which time the company may bring out a number of issue of securities, all covered by the same prospectus

d. The validity of a shelf prospectus of a maximum period of one year shall commence from the date on opening of the first offer.

A company filing a shelf prospectus with the Registrar shall not be required to file prospectus afresh at every stage of offer of securities by it within a period of validity of such shelf prospectus.

However, under section 31 (2), a company shall be required to file an information memorandum on all material facts relating to new charges created, changes in the financial position of the company as have occurred between the first offer of securities or any previous offer of securities and the succeeding offer of securities and such other changes as may be prescribe, with the Registrar within the prescribed time, prior to the issue of a second or subsequent offer of securities under the shelf prospectus.

Section 31 (3) states that where an information memorandum is filed every time an offer of securities is made, such memorandum together with the shelf prospectus shall be deemed to be the prospectus.
Question 7

What is meant by ‘Red-herring prospectus? State the circumstances under which such prospectus is required to be filed with the Registrar of Companies. What is the requirement relating to filing of final prospectus in such cases?

Answer

Red-herring Prospectus (Section 32 of the Companies Act, 2013): A red-herring prospectus means a prospectus which does not include complete particulars of the price or the quantum of securities offered therein [Explanation to Section 32]. Section 2 (70) of the Companies Act, 2013 defines a prospectus includes a red herring prospectus within its meaning. Hence, a red herring prospectus is a prospectus within the meaning of section 2 (70).

Under section 32 (1) a public company proposing to make an offer of securities may issue a red herring prospectus prior to the issue of a prospectus. Therefore, the issue of a red herring prospectus does not absolve a company from issuing a regular prospectus in accordance with the relevant provisions of the Companies Act 2013.

According to section 32 (1) a company proposing to issue a red herring prospectus under sub-section (1) shall file it with the Registrar at least three days prior to the opening of the subscription list and the offer.

Section 32 (3) states that a red herring prospectus shall carry the same obligations as are applicable to a prospectus and any variation between the red herring prospectus and a prospectus shall be highlighted as variations in the prospectus.

Section 32 (4) states that upon the closing of the offer of securities, the prospectus stating therein the total capital raised, whether by way of debt or share capital, and the closing price of the securities and any other details as are not included in the red herring prospectus shall be filed with the Registrar and the Securities and Exchange Board.

On the basis of offers received, company will finalise the issue price and issue size and then close the offer. After closure of offer of securities, a final prospectus will be prepared stating the total capital raised whether by way of debts, or share capital and the closing price of securities and any other details as were not complete in red-herring prospectus. The prospectus will be filed with ROC and also with SEBI in case of listed company.

Mis-statement in prospectus and its consequences

Question 8

A company issued a prospectus. All the statements contained therein were literally true. It also stated that the company had paid dividends for a number of years, but did not disclose the fact that the dividends were not paid out of trading profits, but out of capital profits. An allottee of shares wants to avoid the contract on the ground that the prospectus was false in material particulars. Decide
The Companies Act, 2013 vide sections 34 and 35 lay down the criminal and civil liabilities of the guilty parties in case of mis statements and misleading inclusions and omissions in a prospectus. Further, section 36 lays down the punishment for fraudulently inducing persons to invest moneys.

However, the present case before us is not in respect of liability for a possible mis statement but on the right of the allottee to avoid the contract of purchasing the shares from the company. In order to decide this, key factor is to determine if any material mis representation or concealment of a material fact has taken place and if such misrepresentation is fraudulent.

The non disclosure of the fact that dividends were paid out of capital profits is a concealment of material fact as a company is normally required to distribute dividend only from trading or revenue profits and under exceptional circumstances can do so out of capital profits. Hence, a material misrepresentation has been made.

The question here is a direct issue arising from the consequence of misrepresentation on the contract and is governed by the Indian Contract Act, 1872.

Section 19 of the Indian Contract Act, 1872 states that when consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

Hence, in the given case the allottee can avoid the contract of allotment of shares. (Rex V. Lord Kylsant).

Question 9
When director is not liable for a misstatement in a prospectus?

Answer

When a director is not liable for criminal liability [Proviso to section 34]:

No criminal liability for any mis statement in a prospectus under this section shall apply to a person if he proves that such statement or omission was immaterial or that he had reasonable grounds to believe, and did up to the time of issue of the prospectus believe, that the statement was true or the inclusion or omission was necessary.

When a director is not liable for civil liability [Section 35 (2)]:

No civil liability for any mis statement under this section shall apply to a person if he proves that:

(a) having consented to become a director of the company, he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or

(b) the prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent.
Question 10

An allottee of shares in a Company brought action against a Director in respect of false statements in prospectus. The director contended that the statements were prepared by the promoters and he has relied on them. Is the Director liable under the circumstances? Decide referring to the provisions of the Companies Act, 2013.

Answer

Yes, the Director shall be held liable for the false statements in the prospectus under sections 34 and 35 of the Companies Act, 2013. Whereas section 34 imposes a criminal punishment on every person who authorises the issue of such prospectus section 35 more particularly includes a director of the company in the imposition of liability for such mis statements.

The only situations when a director will not incur any liability for mis statements in a prospectus are as under:

(a) No criminal liability under section 34 shall apply to a person if he proves that such statement or omission was immaterial or that he had reasonable grounds to believe, and did up to the time of issue of the prospectus believe, that the statement was true or the inclusion or omission was necessary.

(b) No civil liability for any mis statement under section 35 shall apply to a person if he proves that:
   a. Having consented to become a director of the company, he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent; or
   b. The prospectus was issued without his knowledge or consent, and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent.

Therefore, in the present case the director cannot hide behind the excuse that he had relied on the promoters for making correct statements in the prospectus. He will be liable for mis statements in the prospectus.

Question 11

State the remedies available against a company to a subscriber for allotment of shares on the faith of a misleading prospectus. What conditions must be satisfied by such a subscriber before opting for the remedies?

Answer

The remedies available to a subscriber arise more from the Indian Contract Act, 1872 than from the Companies Act, 2013. A misstatement in a prospectus will cover both an information included and an information omitted from the prospectus and may result from either a mistake, or a misrepresentation or a fraudulent statement.
The Companies Act, 2013 lays down the punishment for the company and the responsible parties which will include directors, promoters, experts etc but does not mention the legal remedies available to an aggrieved investor apart from making the guilty persons liable to pay compensation to every person who has sustained loss or damage from purchase of securities on the strength of a prospectus containing mis-statements.

Hence, we have to turn to the Indian Contract Act, 1872 which vide section 19 states that when consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is voidable at the option of the party whose consent was so caused. On the other hand, a party to contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put on the position in which he would have been if the representations made had been true.

Therefore, to summarize, the remedies available to a subscriber for mis-statements in prospectus are as under:

(a) He may claim compensation from directors, promoters or experts for any loss or damage sustained by such purchase;

(b) He may avoid the contract under section 19 of the Indian Contract Act, 1872; or

(c) He may enforce the contract and be placed in the position in which he would have been if the representation made has been true. This is an unlikely situation and may not be practically possible.

Hence, for all practical purposes he will have the remedies under (a) and (b) above.

**Question 12**

*With a view to issue shares to the general public a prospectus containing some false information was issued by a company. Mr. X received copy of the prospectus from the company, but did not apply for allotment of any shares. The allotment of shares to the general public was completed by the company within the stipulated period. A few months later, Mr. X bought 2000 shares through the stock exchange at a higher price which later on fell sharply. X sold these shares at a heavy loss. Mr. X claims damages from the company for the loss suffered on the ground the prospectus issued by the company contained a false statement. Referring to the provisions of the Companies Act, 2013 examine whether X's claim for damages is justified.*

**Answer**

Under section 2 (70) of the Companies Act, 2013, “prospectus” means any document described or issued as a prospectus and includes a red herring prospectus referred to in section 32 or shelf prospectus referred to in section 31 or any notice, circular, advertisement or other document inviting offers from the public for the subscription or purchase of any securities of a body corporate.
A prospectus is a document inviting offers from the public. The prospectus and any statement therein has no legal binding either on the company or its directors, promoters or experts to a person who has not purchased securities in response to it.

Since X purchased shares through the stock exchange open market which cannot be said to have bought shares on the basis of prospectus. X cannot bring action for deceit against the directors. X will not succeed. It was held in the case of Peek Vs. Gurney that the above-mentioned remedy by way of damage will not be available to a person if he has not purchased the shares on the basis of prospectus.

**Question 13**

**Peek Ltd. Co.** issued and published its prospectus to invite the investors to purchase its shares. The said prospectus contained false statement. Mr. X purchased some partly paid shares of the company in good faith on the Stock Exchange. Subsequently, the company was wound up and the name of Mr. X was in the list of contributors. Decide:

(i) Whether Mr. X is liable to pay the unpaid amount?

(ii) Can Mr. X sue the directors of the company to recover damages?

**Answer**

**False statement in Prospectus under the Companies Act, 2013**

(i) Yes, X is liable to pay the unpaid amount on the shares. As X has purchased partly paid shares, so he is liable for the remaining value of the shares. At the time of winding up he is liable to contribute as a contributory. The related case law in this subject matter is Peak vs. Gurney.

(ii) No, X cannot sue the directors to recover damages for the misstatement in the prospectus. The shareholder must have relied on the statement in the prospectus in applying for shares offered by it to hold the responsible persons liable. If a person purchases shares in the open market, the prospectus is non operative as far as he is concerned. In the present case, Mr. X purchased shares on the stock exchange even if he did so on good faith he had not relied on the statement in prospectus.

Therefore, he cannot sue the directors of the company to recover damages.

**Question 14**

**M applies for share on the basis of a prospectus which contains mis–statement. The shares are allotted to him, who afterwards transfers them to N. Can N bring an action for a rescission on the ground of mis-statement? Decide under the provisions of the Companies Act, 2013.**

**Answer**

**Mis-statement in prospectus:** No, N cannot bring an action for rescission of the contract to buy shares from M on the ground of mis-statement as under section 37 of the Companies Act, 2013 a suit may be filed or any other action may be taken under section 34 or section 35 or
section 36 only by any person, group of persons or any association of persons affected by any misleading statement or the inclusion or omission of any matter in the prospectus.

Question 15

Modern Furnitures Limited was willing to purchase teakwood estate in Chhattisgarh State. Its prospectus contained some important extracts from an expert report giving the number of teakwood trees and other relevant information in the estate in Chhattisgarh State. The report was found inaccurate. Mr. 'X' purchased the shares of Modern Furnitures Limited on the basis of the above statement in the prospectus. Will Mr. 'X' have any remedy against the company? When will an expert not be liable? State the provisions of the Companies Act, 2013 in this respect.

Answer

Under section 35 (1) of the Companies Act 2013, where a person has subscribed for securities of a company acting on any statement included in the prospectus which is misleading and has sustained any loss or damage as a consequence thereof, the company and every person who is a director, promoter or an expert shall, without prejudice to any punishment to which any person may be liable under section 36, be liable to pay compensation to every person who has sustained such loss or damage.

The Companies Act, 2013 lays down the punishment for the company and the responsible persons which includes directors, promoters, experts etc but does not mention the legal remedies available to an aggrieved investor apart from the above mentioned compensation.

The remedy to an investor who has invested on the strength of the statements in the prospectus and such statements have turned out to be false or misleading, should also be assessed from the Indian Contract Act, 1872 which provides for various remedies for contracts induced by coercion, undue influence, misrepresentation, frauds or mistake. In the present case, Mr X has already purchased the shares which means the transaction has been completed, hence the option of rescinding it at his option does not arise. On the other hand Mr X can claim compensation for any loss or damage that he might have sustained from the purchase of shares. But this is possible only if he has sustained any loss or damage which has not been mentioned in the case given above.

Hence, Mr X will have no remedy either against the company or the expert based on the facts of the case given.

An expert will not be liable for any mis statements in the prospectus under the following situations:

(i) Section 26 (5): that having given his consent, he withdrew it in writing before delivery of the copy of prospectus for registration or

(ii) Section 35 (2): that the prospectus was issued without his knowledge or consent and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent; An expert will not be liable in respect of any
question not made him in the capacity of an expert and included in the prospectus as such;

**Question 16**

*What is the law relating to criminal liability for mis-statement in the prospectus under the Section 34 of the Companies Act, 2013?*

**Answer**

Under section 34 where a prospectus, issued, circulated or distributed, includes any statement which is untrue or misleading in form or context in which it is included or where any inclusion or omission of any matter is likely to mislead, every person who authorizes the issue of such prospectus shall be liable under section 447.

Section 447 states that any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months (in case of public interest, the term of imprisonment shall not be less than three years) but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud.

Hence, the criminal liability of the responsible persons shall arise only in case of fraudulent misstatements. In the absence of fraudulent intention, criminal liability shall not arise for any misstatements in the prospectus.

It is further provided in section 34 that no liability under the section shall apply to a person if he proves that such statement or omission was immaterial or that he had reasonable grounds to believe, and did up to the time of issue of the prospectus believe, that the statement was true or the inclusion or omission was necessary.

**Question 17**

*State the liability of an ‘Expert’ in case of misrepresentation in the prospectus. When an expert will not be liable for his untrue statements made in the prospectus?*

**Answer**

Punishment for mis-statements in a prospectus is contained in sections 34 and 35 of the Companies Act, 2013. While section 34 deals with criminal liability of the guilty persons, section 35 deals with the civil liability of the company and the specified persons.

Section 34 holds all those persons who authorize the issue of such prospectus which contains misstatements, it would not apply to an expert as he only gives an expert view on specific matters but does not authorize the issue of the prospectus. Authorization of the issue of a prospectus is done by directors and promoters and hence they will be criminally liable under this section.

Section 35 on the other hand imposes a liability on the company and every director, promoter, expert and any person who has authorized the issue of the prospectus, to pay compensation to every person who has sustained any loss or damage by subscribing for securities of the
company by relying on any statement in the prospectus which has turned out to be misleading.

Thus, the liability of an expert in case of misrepresentation in the prospectus will arise in terms of section 35 and will be specific to any mis statements made by him as an expert.

An expert will not be liable for any mis statements in the prospectus under the following situations:

(i) Section 26 (5): that having given his consent, he withdrew it in writing before delivery of the copy of prospectus for registration or

(ii) Section 35 (2): that the prospectus was issued without his knowledge or consent and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent;

(i) An expert will only be liable for any mis statements made by him in the capacity of an expert and not for any other statement in the prospectus.

Offer for sale or Prospectus by implication or Deemed prospectus

Question 18

Explain the concept of “Deemed Prospectus” under the Companies Act, 2013. Point out the circumstances where under issuing the prospectus is not mandatory.

Answer

Deemed Prospectus: Under section 25 (1) of the Companies Act, 2013 any document by which an offer for sale of any securities is made to the public and the company allots or agrees to allot securities in terms thereof, then such document shall for all purposes, be deemed to be a prospectus and all enactments and rules of law as to the contents in a prospectus and as to liability in respect of mis-statements and omissions therein shall apply and shall have effect as they apply to a prospectus.

From the above provision it is quite clear that the deemed prospectus is not intended to be a document with any exceptions or concessions vis a vis a prospectus. It only broadens the scope of a prospectus to include not only the formal document issued as a prospectus but also all nature of communication made by the company with the intention of selling an issue. It is designed to prevent companies from making misleading statements through various documents, notices or circulars while keeping the formal prospectus document clean.

When Prospectus need not be issued: The issue of prospectus under Section 23 of the Companies Act, 2013 is not necessary in the following circumstances:

(i) Where a person is a bona fide invitee to enter into an underwriting agreement with regard to any securities.

(ii) Where securities are offered through private placement by complying with the provisions related thereto in the Companies Act, 2013.
(iii) Where securities are issued through a rights issue or a bonus issue in accordance with
the applicable provisions of the Act and in case of listed companies also in accordance
with the provisions of the rules and regulations made by SEBI in this behalf;

**Allotment of Shares**

**Question 19**

*What do you mean by Allotment of shares?*

**Answer**

Allotment of shares is the acceptance by the company of the offer to buy shares in response
to an issue of shares. When shares are issued, applications are invited by the company from
either the public or institutions in case of a public issue and from the private persons /
institutions in case of private placements to apply for the shares offered. When such
applications are accepted and approved by the company, the shares are said to be allotted to
the respective applicants.

Allotment of shares can only take place when shares are offered for sale by a company.
Hence, allotment cannot be made in respect of bonus shares.

**Minimum Subscription and Refund & Restriction on use of Application Moneys**

**Question 20**

*Define Minimum Subscription. When it is liable to be refunded? Can share application money
be deposited in any bank?*

**Answer**

Minimum subscription is the minimum amount out of the total amount of securities issued by a
company which is stated in the prospectus as such. A company under section 39 (1) of the
Companies Act, 2013 cannot proceed with the allotment of securities to the public unless the
amount stated in the prospectus as the minimum amount has been subscribed and the
amounts payable on the application for the minimum amount so stated has been received by
the company by cheque or by other instrument.

Further section 39 (2) states that the amount payable on application on every security must
not be less than 5% of the nominal value (face value) of the security or such other percentage
or amount as may be specified by SEBI by making regulations in this behalf.

However, it must be noted that the minimum amount stated in the prospectus as such may not
necessarily be the same as the amount payable on application in respect of securities offered.
On the other hand the moneys payable on application cannot be lower than the minimum
amount as stated in the prospectus.

Under section 39 (3) if the stated minimum amount has not been subscribed and the sum
payable on application, is not received within a period of 30 days from the date of issue of the
prospectus, or such other period as may be specified by the Securities and Exchange Board,
the amount received under sub-section (1) shall be returned within such time and manner as may be prescribed.

Section 40 (3) provides for the deposit of the application moneys received from the public for subscription to the securities offered, in a separate bank account in a scheduled bank and shall not be utilized for any purpose other than adjusting the same against the allotment of securities or refunding the same in case allotment is not made for any reason.

**Question 21**

*What is ‘Minimum Subscription’ and “Opening of Subscription List” in Public Issue of Shares?*

**Answer**

Minimum subscription is the minimum amount out of the total amount of securities issued by a company which is stated in the prospectus as such. A company under section 39 (1) of the Companies Act, 2013 cannot proceed with the allotment of securities to the public unless the amount stated in the prospectus as the minimum amount has been subscribed and the amounts payable on the application for the minimum amount so stated has been received by the company by cheque or by other instrument.

The purpose behind the provision of minimum subscription is to prevent a company from starting its business without adequate financial resources. This is also an investor protection measure as the company has to refund the amounts collected on applications in case the minimum subscription as stated in the prospectus is not received.

There is a time gap between the date when an issue is opened and when the issue closes. The opening of the issue marks the date when the members of the public can begin to make applications for purchasing the securities offered and the closing date is the date after which the company will not accept any further applications. Both these dates are required to be mentioned in the prospectus under section 26 of the Companies Act, 2013.

The date on which the offer for securities open is called the opening of the subscription list in a public issue of shares.

**Question 22**

*State with reason, whether the following statement is correct or incorrect, according to the Companies Act, 1956.*

_In the case of Public issue of shares, the subscription list is to be kept open for a minimum period of 3 working days._

**Answer**

**Correct.** The subscription list for public issues should be kept open for at least 3 working days and a disclosure to this effect should be made in the prospectus.
Question 23

In what way does the Companies Act, 2013 regulate and restrict the following in respect of a company going for public issue of shares:

(i) Minimum Subscription, and
(ii) Application Money payable on shares being issued? Explain.

OR

If a company does not receive the minimum subscription, it should refund money received from applicants within such time as may be prescribed.

Answer

The Companies Act, 2013 by virtue of provisions as contained in Section 39 (1) and (2) regulates and restricts the minimum subscription and the application money payable in a public issue of shares as under:

Minimum subscription [Section 39 (1)]

No Allotment shall be made of any securities of a company offered to the public for subscription; unless;

(i) the amount stated in the prospectus as the minimum amount has been subscribed; and
(ii) the sums payable on application for such amount has been paid to and received by the company.

Position as Per SEBI Regulations: As per SEBI Regulations, the minimum subscription in respect of public and rights issue shall be 90% of the issue amount. The requirement of 90% minimum subscription shall not be mandatory in case of offer for sale of securities. In case of non-receipt by the company of 90% of the issued amount from public subscription plus accepted development from underwriters or from other sources in case of under-subscribed issues, within 60 days from the date of closure of the issue, the company shall refund forthwith the subscription amount in full without interest and with interest @15% p.a. if not paid within 10 days after expiry of the said 60 days.

Application money: Section 39 (2) provides that the amount payable on application on each security shall not be less than 5% of the nominal amount of such security or such amount as SEBI may prescribe by making any regulations in this behalf.

Further section 39 (3) provides that if the stated minimum amount is not received by the company within 30 days of the date of issue of the prospectus or such time as prescribed by SEBI, the company will be required to refund the application money received within such time and manner as may be prescribed.

Section 40 (3) provides that all moneys received on application from the public for subscription to the securities shall be kept in a separate bank account maintained with a scheduled bank
Question 24

A public limited company which went in for Public issue of shares had applied for listing of shares in three recognised Stock Exchanges and out of it only two had given permission for listing. Can the company proceed for allotment of shares?

Answer

Under section 40 (1) of the Companies Act, 2013 every company making a public offer shall, before making such offer, make an application to one or more recognised stock exchange or exchanges and obtain permission for the securities to be dealt with in such stock exchange or exchanges.

Section 40 (2) further states that where a prospectus states that an application under sub-section (1) has been made, such prospectus shall also state the name or names of the stock exchange in which the securities shall be dealt with.

From the above it is clear that not only has the company to apply for listing of the securities at a recognized stock exchange but also obtain permission thereof before making the public offer.

Hence, under the Companies Act, 2013 by making the offer of shares before getting the approval from the stock exchanges, it has violated the provisions of section 40 and under section 40 (5) will be punishable with a fine which shall not be less than ` 5 Lakhs but may extend to ` 50 Lakhs and every officer in default shall be punishable with imprisonment for a term which may extend upto one year or with a fine of not less than ` 50,000/- but which may extend upto ` 3 Lakhs, or with both.

[Note: The company seems to have defaulted because the question talks about proceeding with allotment which means that the offer has been made and applications received].

Question 25

When is an Allotment of Shares treated as an irregular allotment? State the effects of an irregular allotment.

Answer

Irregular allotment: The Companies Act, 2013 does not separately provide for the term “Irregular Allotment” of securities. Hence, one will have to examine the requirements of a proper issue of securities and consider the consequences of non fulfilment of those requirements.

In broad terms an allotment of shares is deemed to be irregular when it has been made by a company in violation of Sections 23, 26, 39 and 40. Irregular allotment therefore arises in the following instances:

1. Where a company does not issue a prospectus in a public issue as required by section 23; or
2. Where the prospectus issued by the company does not include any of the matters required to be included therein under section 26 (1), or the information given is misleading, faulty and incorrect; or

3. Where the prospectus has not been filed with the Registrar for registration under section 26 (4);

4. The minimum subscription as specified in the prospectus has not been received in terms of section 39; or

5. The minimum amount receivable on application is less than 5% of the nominal value of the securities offered or lower than the amount prescribed by SEBI in this behalf; or

6. In case of a public issue, approval for listing has not been obtained from one or more of the recognized stock exchanges under section 40 of the Companies Act, 2013.

**Effects of irregular allotment:** The consequences of an irregular allotment depend on the nature of irregularity. However, the Companies Act, 2013 does not mention (unlike the previous Companies Act) that in case of an irregular allotment the contract is voidable at the option of the allottee.

Under section 26 (9) of the Companies Act, 2013 if a prospectus is issued in contravention of the provisions of section 26, the company shall be punishable with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees and every person who is knowingly a party to the issue of such prospectus shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees, or with both.

Similarly in case the company has not received the minimum subscription amount within 30 days of the date of issue of the prospectus, it must refund the application money received by it within the stipulated time. Any allotment made in violation of this will be void and the defaulting company and officers will be liable to further punishment as provided in section 39 (5).

Under section 40 (5) any default made in respect of getting the approval to listing of securities in one or more recognized stock exchange in case of a public issue, will render the company punishable with a fine which shall not be less than five lakh rupees but which may extend to fifty lakh rupees and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than fifty thousand rupees but which may extend to three lakh rupees, or with both.

Hence, under various provisions of the Companies Act, 2013 stringent punishment has been provided for against irregular allotment of securities but the option of going ahead with such allotment even if desired by the allottee is not specifically permitted.

**Question 26**

*After receiving 80% of the minimum subscription as stated in the prospectus, a company allotted 100 equity shares in favour of ‘X’. The company deposited the said amount in the bank but withdrew 50% of the amount, before finalisation of the allotment, for the purchase of*
certain assets. X refuses to accept the allotment of shares on the ground that the allotment is violative of the provisions of the Companies Act, 2013. Comment.

Answer

Allotment of Shares: The company has received 80% of the minimum subscription as stated in the prospectus. Hence, the allotment is in contravention of section 39(1) of the Companies Act, 2013 which prohibits a company from making any allotment of securities until it has received the amount of minimum subscription stated in the prospectus. Under section 39 (3), it is required to refund the money received (i.e. 80% of the minimum subscription) to the applicants. It has no other option available.

Therefore, in the present case X is within his rights refuses to accept the allotment of shares which has been illegally made by the company.

Question 27

The Board of Directors of M/s Reckless Investments Ltd. have allotted shares to the investors of the company without issuing a prospectus with the Registrar of Companies, Mumbai. Explain the remedies available to the investors in this regard.

Answer

According to Section 23 of the Companies Act, 2013, a public company can issue securities to the public only by issuing a prospectus. Section 26 (1) lays down the matters required to be disclosed and included in a prospectus and requires the registration of the prospectus with the Registrar before its issue.

In the given case, the company has violated with the above provisions of the Act and hence the allotment made is void. The company will have to refund the entire moneys received and will also be punishable under section 26 (9) of the Act.

Question 28

Mars India Ltd. owed to Sunil `1,000. On becoming this debt payable, the company offered Sunil 10 shares of `100 each in full settlement of the debt. The said shares were fully paid and were allotted to Sunil.

Examine the validity of these allotments in the light of the provisions of the Companies Act, 2013

Answer

Under section 62 (1) (c) of the Companies Act, 2013 where at any time, a company having a share capital proposes to increase its subscribed capital by the issue of further shares, either for cash or for a consideration other than cash, such shares may be offered to any persons, if it is authorised by a special resolution and if the price of such shares is determined by the valuation report of a registered valuer subject to such conditions as may be prescribed.
In the present case, Mars India Ltd is empowered to allot the shares to Sunil in settlement of its debt to him. The issue will be classified as issue for consideration other than cash must be approved by the members by a special resolution. Further, the valuation of the shares must be done by a registered valuer.

**Question 29**

*Explain the provisions and main contents of "Return of Allotment" under the Companies Act, 2013.*

**Answer**

Under section 39 (4) of the Companies Act, 2013 whenever a company having a share capital makes an allotment of securities, it shall file with the Registrar a return of allotment in such manner as may be prescribed.

Rule 12 of the Companies (Prospectus and Allotment of Securities) Rules 2014 prescribes the manner for filing of the return of allotment. Whenever a company having a share capital makes any allotment of its securities, the company shall, within thirty days thereafter, file with the Registrar a return of allotment in Form PAS – 3, along with the fee as specified in the Companies (Registration Offices and Fees) Rules, 2014.

**Attachments and inclusions in Form PAS 3**

a. A list of allottees states their names, address, occupation, if any, and number of securities allotted to each duly certified by the signatory of the Form PAS – 3 as being complete and correct as per the records of the company.

b. In the case of securities (not being bonus shares) allotted as fully or partly paid up for consideration other than cash, there shall be attached to the Form PAS – 3 a copy of the contract, duly stamped, pursuant to which the securities have been allotted together with copy of any contract of sale if relating to a property or an asset, or a contract for services or other consideration.

c. In the case of issue of bonus shares, a copy of the resolution passed in the general meeting authorizing the issue of such shares shall be attached to the Form PAS –3.

**Underwriting**

**Question 30**

*Explain clearly the meaning of the term ‘Underwriting’ and ‘Underwriting Commission’. In what way, does the Companies Act, 2013 regulate payment of such Commission? Explain.*

Or

*In what way does the Companies Act, 2013 regulate the payment of ‘underwriting commission’? Explain the provisions of the Act, state the conditions to be complied with before payment of such commission can be made to underwriters of the company.*
Answer

'Underwriting' is a contract entered into between the company and certain parties (called underwriters) whereby the underwriters guarantee to purchase or get investors to purchase the whole or an agreed portion of the securities that are not applied for by the public for subscription. In consideration of this guarantee the company pays a commission to the underwriters as a percentage of the value of the shares offered to the public.

The consideration payable to the underwriters for underwriting the issue of shares or debentures of a company is called underwriting commission. Such a commission is paid at a specified rate on the issue price of the whole of the shares or debentures underwritten whether or not the underwriters are called upon to take up any shares or debentures. Thus, the underwriters are paid for the risk they bear in the placing of shares before the public. Underwriting commission may be in addition to brokerage.

Under Section 40 (6) of the Companies Act 2013, provides that a company may pay commission to any person in connection with the subscription or procurement of subscription to its securities, subject to the following conditions which are prescribed under the Companies (Prospectus and Allotment of Securities) Rules, 2014:

(a) the payment of such commission shall be authorized in the company’s articles of association;

(b) the commission may be paid out of proceeds of the issue or the profit of the company or both;

(c) the rate of commission paid or agreed to be paid shall not exceed, in case of shares, five percent (5%) of the price at which the shares are issued or a rate authorised by the articles, whichever is less, and in case of debentures, shall not exceed two and a half percent (2.5 %) of the price at which the debentures are issued, or as specified in the company’s articles, whichever is less;

(d) the prospectus of the company shall disclose -
   i. the name of the underwriters;
   ii. the rate and amount of the commission payable to the underwriter; and
   iii. the number of securities which is to be underwritten or subscribed by the underwriter absolutely or conditionally.

(e) there shall not be paid commission to any underwriter on securities which are not offered to the public for subscription;

(f) a copy of the contract for the payment of commission is delivered to the Registrar at the time of delivery of the prospectus for registration.

Thus, the Underwriting commission is limited to 5% of issue price in case of shares and 2.5% in case of debentures. The rates of commission given above are maximum rates. The company is free to negotiate lower rates with underwriters.
Question 31

The Board of Directors of a company decide to pay 5% of issue price as underwriting commission to the underwriters. On the other hand the Articles of Association of the company permit only 3% commission. The Board of Directors further decide to pay the commission out of the proceeds of the share capital. Are the decisions taken by the Board of Directors valid under the Companies Act, 2013?

Answer

Underwriting Commission

Under the Companies (Prospectus and Allotment of Securities) Rules, 2014 the rate of commission paid or agreed to be paid shall not exceed, in case of shares, five percent (5%) of the price at which the shares are issued or a rate authorised by the articles, whichever is less.

The same rules allow the commission to be paid out of proceeds of the issue or the profit of the company or both.

Therefore, the decision of the Board of Directors to pay 5% commission to the underwriters is invalid while the decision to pay out of the proceeds of the share issue is valid.

Question 32

The Articles of Association of MSW Ltd. contained a provision that upto 4% of issue price of the shares may be paid as underwriting commission to the underwriters. The Board of directors decided to pay 5% underwriting commission. Can the Board of directors do so? State the provisions of law in this regard as stated under the Companies Act, 2013.

Answer

Under the Companies (Prospectus and Allotment of Securities) Rules, 2014 the rate of commission paid or agreed to be paid shall not exceed, in case of shares, five percent (5%) of the price at which the shares are issued or a rate authorised by the articles, whichever is less.

In the given problem, the articles of MSW Ltd have prescribed 4% underwriting commission but the directors decided to pay 5% underwriting commission.

Therefore, the decision of the Board of Directors to pay 5% commission to the underwriters is invalid.

Question 33

Unique Builders Limited, decides to pay 2.5 percent of the value of debentures as underwriting commission to the underwriters but the Articles of the company authorize only 2.0 percent underwriting commission on debentures. The company further decides to pay the underwriting commission in the form of flats. Examine the validity of the above arrangements under the provisions of the Companies Act, 2013.
Answer

Section 40 (6) of the Companies Act 2013, provides that a company may pay commission to any person in connection with the subscription or procurement of subscription to its securities, whether absolute or conditional, subject to the a number of conditions which are prescribed under Companies (Prospectus and Allotment of Securities) Rules, 2014. In relation to the case given, the conditions applicable under the above Rules are as under:

(a) The payment of such commission shall be authorized in the company's articles of association;

(b) The commission may be paid out of proceeds of the issue or the profit of the company or both;

(c) The rate of commission paid or agreed to be paid shall not exceed, in case of shares, five percent (5%) of the price at which the shares are issued or a rate authorised by the articles, whichever is less, and in case of debentures, shall not exceed two and a half percent (2.5 %) of the price at which the debentures are issued, or as specified in the company's articles, whichever is less;

Thus, the Underwriting commission is limited to 5% of issue price in case of shares and 2.5% in case of debentures. The rates of commission given above are maximum rates.

In view of the above the decision of Unique Builders Ltd to pay underwriting commission exceeding 2% as prescribed in the Articles is invalid.

The company may pay the underwriting commission in the form of flats as both the Companies Act and the Rules do not impose any restriction on the mode of payment though the source has been restricted to either the proceeds of the issue or profits of the company.

Purchase of own shares and financial assistance for purchase of own shares

Question 34

Apex Metals Limited wants to provide financial assistance to its employees, to enable them to subscribe for certain number of fully paid shares. Considering the provision of the Companies Act, 2013, what advice would you give to the company in this regard?

Answer

Under section 67 (2) of the Companies Act, 2013 no public company is allowed to give, directly or indirectly or by means of a loan, guarantee, or security, any financial assistance for the purpose of, or in connection with, a purchase or subscription, by any person of any shares in it or in its holding company.

However, section 67 (3) makes an exception by allowing companies to the give loans to their employees other than its directors or key managerial personnel, for an amount not exceeding their salary or wages for a period of six months with a view to enabling them to
purchase or subscribe for fully paid-up shares in the company or its holding company to be held by them by way of beneficial ownership.

Provided that disclosures in respect of voting rights not exercised directly by the employees in respect of shares to which the scheme relates shall be made in the Board’s report in such manner as may be prescribed.

Hence, Apex Metals Ltd can provide financial assistance upto the specified limit to its employees to enable them to subscribe for the shares in the company provided the shares are purchased by the employees to be held for beneficial ownership by them. However, the key managerial personnel will not be eligible for such assistance.

**Question 35**

A Company wants to provide financial assistance to its employees to enable them to subscribe for fully paid shares of the company. Does it amount to purchase of its own shares. If, in the instant case, the company itself purchasing to redeem its preference shares, does it amount to acquisition of its own shares?

**Answer**

Yes, the financial assistance to its employees by the company to enable them to subscribe for the shares of the company will amount to the company purchasing its own shares. However, section 67 (3) permits a company to give loans to its employees other than its directors or key managerial personnel, for an amount not exceeding their salary or wages for a period of six months with a view to enabling them to purchase or subscribe for fully paid-up shares in the company or its holding company to be held by them by way of beneficial ownership.

Section 68 of the Companies Act, 2013 however, allows a company to buy back its own shares under certain circumstances and subject to fulfilment of prescribed conditions.

Purchasing in order to redemption its preference shares, does amount to acquisition or purchase of its own shares. But this is allowed in terms of section 68 of the Companies Act, 2013 subject to the fulfilment of prescribed conditions, and upto specified limits and only after following the prescribed procedure.

**Question 36**

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 share of ₹1,000 each of XYZ Limited. Examine the validity of Board’s decision with reference to the provisions of the Companies Act, 2013.

**Answer**

Under section 67 (3) of the Companies Act, 2013 a company is allowed to give a loan to its employees subject to the following limitations:

(a) The employee must not be a key managerial personnel;
(b) The amount of such loan shall not exceed an amount equal to six months' salary of the employee.

(c) The shares to be subscribed must be fully paid shares

Section 2 (51) defines the “Key Managerial Personnel” (KMP) whereby a KMP includes the chief executive, company secretary, whole time director, Chief Financial Officer or any other officer who may be prescribed.

We can assume the Mr P being a fiancé manager is not a KMP of the company.

Keeping the above provisions of law in mind, the Board’s decision is invalid due to two reasons:

i. The amount being more than 6 months’ salary of Mr P, which should have restricted the loan to ₹ 1.8 Lakhs.

ii. The shares subscribed are partly paid shares where as the benefit is available only for subscribing in fully paid shares.

Whether a company can ‘buy back' its own shares?

Question 37

A public company proposes to purchase its own shares. State the source of funds that can be utilised by the company for purchasing its own shares and the requirements to be complied with by the company under the Companies Act before and after the shares are so purchased.

Or

ADJ Company Limited decides to buy-back its own shares. Advise the company's Board of Directors about the sources out of which the company can buy-back its own shares. What conditions are attached to the buy-back scheme of the company in accordance with the provisions of the Companies Act, 2013? Explain.

Or

Choose the correct answer from the following and give reasons:

Sources of funds for buy back of shares are:

(a) Free reserves or securities premium account

(b) The proceeds of any shares or other specified securities

(c) (a) and (b) both

(d) None of the above.

Answer

Sources of funds for buy-back of shares: Under section 68 (1) of the Companies Act, 2013 a company can purchase its own shares or other specified securities. The purchase should be out of:
(i) its free reserves; or
(ii) the securities premium account; or
(iii) the proceeds of the issue of any shares or other specified securities.

However, buy-back of any kind of shares or other specified securities cannot be made out of the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities.

'Specified securities' includes employees' stock option or other securities as may be notified by the Central Government from time to time. [Explanation (1) under Section 68],

Requirements to be complied with before buy-back: Under section 68 (2) of the Companies Act, 2013 a company shall not purchase its own shares or other specified securities unless:

(a) the buy-back is authorised by its articles;
(b) a special resolution (also Declaration of Solvency to be filed with ROC & SEBI in case shares are listed on any recognised stock exchange), authorising the buy-back is passed at a general meeting of the company;
(c) the buy-back is 25% or less than of the aggregate of the paid-up capital and free reserves of the company;

Provided that the buy-back of equity shares in any financial year shall not exceed 25% of its total paid up equity capital in that financial year.
(d) the ratio of the aggregate of the secured and unsecured debt owed by the company is not more than twice the capital and free reserves after such buy-back;

Provided that the Central Government may prescribe a higher ratio of the debt than that specified under this clause for a class or classes of companies. The second explanation to section 68 clarifies that the expression “free reserves” shall include the securities premium account.
(e) all the shares or other specified securities for buy-back are fully paid-up;
(f) the buy-back of the shares or other specified securities listed on any recognised stock exchange is in accordance with the regulations made by SEBI in this behalf;
(g) the buy-back in respect of shares or other specified securities other than those specified in Clause (f) above is in accordance with such guidelines as may be prescribed.

Under section 68 (3) of the Companies Act, 2013 the notice of the meeting at which the special resolution is proposed to be passed shall be accompanied by an explanatory statement stating:

(a) a full and complete disclosure of all material facts;
(b) the necessity for the buy-back;
The Companies Act, 2013 6.70

(c) the class of shares or securities intended to be purchased under the buy-back;

(d) the amount to be involved under the buy-back; and

(e) the time limit for completion of buy-back.

Under section 68 (4) of the Companies Act, 2013 every buy-back must be completed within a period of one year from the date of the passing of the special resolution, or the Board Resolution where the buy-back is upto 10% of the aggregate of the paid-up capital and free reserves of the company.

Under section 68 (5) a company proposing to buy back its own shares must file with the Registrar and with SEBI a declaration of solvency signed by at least two directors out of which one must be the Managing Director. This must be filed before proceeding with the buy-back.

Requirements to be complied with after buy-back:

1. The securities bought back should be extinguished and physically destroyed within 7 days after completion of buy-back [Section 68 (7)].

2. After completion of buy-back, a company cannot issue same kind of shares or security (which was bought back) for a period of 6 months. Allotment of rights issue renounced by members is also not permissible in this period. However, following are permitted:
   (i) issue of security of a different class that is other than one which was bought back,
   (ii) bonus issue,
   (iii) subsisting obligations such as conversion of warrants,
   (iv) stock option to employees
   (v) sweat equity
   (vi) conversion of preference shares or debentures into equity shares [Section 68(8)].

3. The company should maintain a register showing securities bought back and consideration paid for the buy-back, date of cancellation of securities, date of extinguishment and physical destruction of securities other prescribed particulars [Section 68(9)].

4. After completion of buy-back, a return has to be filed with the Registrar of Companies and Securities and Exchange Board of India if the company is listed within 30 days giving details as prescribed [Section 68(10)].

5. If the buy-back is from free reserves, a sum equal to the nominal value of shares purchased will be transferred to capital redemption reserve account. Details of such transfer will be disclosed in the balance sheet of the company [(Section 69(1)].

Question 38

Define the term "Free Reserves" as contained in the Companies Act, 2013.
Free reserve- As per section 2(43) of the Companies act, 2013, “Free Reserves” means such reserves which as per the latest audited balance sheet of a company are available for distribution as dividend provided that:

i. Any amount representing unrealized gains, notional gains or revaluation of assets, whether shown as a reserve or otherwise or

ii. Any change in carrying amount of an asset or of a liability recognized in equity, including surplus in profit and loss account on measurement of the asset or the liability at fair value shall not be treated as free reserves.

Question 39

ABC Company Limited at a general meeting of members of the company pass an ordinary resolution to buy-back 30% of its Equity Share Capital. The articles of the Company empower the company for buy-back of shares. The company further decide that the payment for buy-back be made out of the proceed of the company’s earlier issue of equity shares. Explaining the provisions of the Companies Act, 2013, and stating the sources through which the buy-back of companies own shares be executed. Examine.

(i) Whether company’s proposal is in order?

(ii) Would your answer be still the same in case the company instead of 30% decide to buy-back only 20% of its Equity Share Capital?

Answer

Buy Back of own Shares: Sources of Funds etc. Under section 68 of the Companies Act, 2013 a company can purchase its own shares or other specified securities subject to fulfilment of prescribed conditions and subject to defined limits and procedures.

Under the various sub sections of section 68 of the Companies Act, 2013 (please see previous answer) in the present case the following facts are note worthy:

a. The Articles permit buy back – This is in order;

b. The approval of the members is by way of an ordinary resolution – This is invalid as the resolution required is a special resolution;

c. The buy back approved is 30% of the Equity Share Capital – The maximum limit allowed for buy back is 25% of the aggregate of the paid up capital and free reserves. Since the value of free reserves is not mentioned this cannot be commented upon.

d. The company plans to pay for the buy back from the proceeds of an earlier equity issue - This is in violation of section 68 (1) of the Act

Taking into account the above factors, the questions as asked in the problem can be answered as under:
(i) The company’s proposal for buy-back is not in order as it has passed only an ordinary resolution and the out of the proceeds of an earlier equity issue in violation of section 68 (1).

(ii) The answer to the second question shall also be the same as the irregularity and contravention will not be affected by the buy back being 20%.

Question 40

ADJ Company Limited decides to buy-back its own shares. Advise the company’s Board of Directors about the sources out of which the company can buy-back its own shares. What conditions are attached to the buy-back scheme of the company in accordance with the provisions of the Companies Act, 2013? Whether there is any time limit for the completion of buy-back of its shares? Explain.

Or

What are the conditions for the company for the buy-back of its own shares? Whether there is any time limit for the completion of buy-back of its shares?

Answer

Buy-back of shares sources and conditions (Section 68 (1) of the Companies Act, 2013):

In accordance with section 68 of the Companies Act, 2013, a company may buy back of its own shares or other specified securities, out of the following sources:

1. Company's free reserves; or
2. Company's securities premium account; or
3. Out of the proceeds of any shared or other specified securities.

However, no buy-back of any kind of shares or other specified securities shall be made out of the proceeds of an earlier issue of the same kind of shares or same kind of other specified securities.

Conditions that must be complied with are as laid down in section 68 (2):

1. Buy-back is authorised by the Company’s Articles.

2. A special resolution has been passed in general meeting of the company authorising buy-back.

3. The buy-back is less than 25% of the aggregate of the total paid-up capital and free reserves of the company. Moreover, the buy-back of equity shares, cannot exceed 25% of company’s paid up equity share capital in a financial year. However, section 68 (2) has authorised the Board of Directors through a Board Resolution, provided the buy back does not exceed 10% of the total paid up equity share capital and free reserves. However, there cannot be more than one such buy-back in any period of 365 days.

4. The ratio of the aggregate of secured and unsecured debt owed by the company is not more than twice the equity capital and free reserve after such buy back. However, the
Central Government may prescribe a higher ratio of the debt for a class or classes of companies.

(5) All shares or other specified securities are fully-paid-up,

(6) The buy back with respect to listed securities is in accordance with the regulations made by the SEBI in this behalf.

Time limit for completion of buy–back: Under section 68 (4), every buy–back shall be completed within 12 months from the date of passing the special resolution or a resolution passed by the Board where the buy back is upto 10% of the aggregate of paid up capital and free reserves.

Question 41

DJA Company Ltd., desirous of buying back of all its equity shares from the existing shareholders of the company, seeks your advice. Examining the provisions of the Companies Act, 2013 advise whether the above buy back of equity shares by the company is possible. Also state the sources out of which buy-back of shares can be financed.

Answer

Buy-back of Shares by Company (Section 68 (2) (c) of the Companies Act, 2013): In terms of section 68 (2) (c) of the Companies Act, 2013 a company is allowed to buy back a maximum of 25% of the aggregate of its paid up capital and free reserves. Hence, the company in the given case is not allowed to buy back its entire equity shares.

Section 68 (1) of the Companies Act, 2013 specifies the sources of funding buy back of its shares and other specified securities as under:

(a) Free reserves or
(b) Security Premium account or
(c) Proceeds of the issue of any shares or other specified securities

However, under the proviso to section 68 (1) no buy back of shares or any specified securities can be made out of the proceeds of an earlier issue of the same kind of shares or same kind of specified securities.

Question 42

Elucidate the circumstances in which a company cannot buy back its own shares as per the provisions of the Companies Act, 2013. M/s Growmore Pharma Limited is planning to buyback of its shares during the current year but the company has defaulted in the payment of term loan & interest thereon to its bankers. The company seeks your advice as to how and when the company can buy back its shares under these circumstances as per the provisions of the Companies Act, 2013.
Answer

Circumstances in which a company cannot buy back its own shares- As per section 70 of the Companies Act, 2013, a company cannot buy back shares or other specified securities directly or indirectly:

(a) Through any subsidiary company including its own subsidiaries; or

(b) Through investment or group of investment companies; or

(c) When the company has defaulted in the repayment of deposit or interest thereon, redemption of debentures or preference shares or payment of dividend or repayment of any term loan or interest thereon to any financial institution or bank. The prohibition does not apply if the default has been remedied and a period of three years has elapsed after such default ceased to subsist.

(d) Company has defaulted in filing of Annual Return (section 92), declaration of dividend (section 123) or punishment for failure to distribute dividend (section 127) and financial statement (section 129).

Under the Companies Act, 2013, now the company can buy-back even if it has defaulted in the repayment of deposit or interest thereon, redemption of debentures or preference shares or payment of dividend or repayment of any term loan or interest thereon to any financial institution or bank, provided the default has been remedied and period of 3 years has elapsed after such default ceased to subsist. Therefore, M/s. Growmore Pharma Limited needs to follow the procedure as highlighted above for buy-back of shares.

Membership

Question 43

Describe the ways to become a member of a company.

A company issued 20 partly paid equity shares and registered them in the name of the minor describing him as minor. The father of the minor signed the application on the minor’s behalf. After some time company went into liquidation. The company filed a suit against father of the minor to recover the remaining amount on the shares. Whether the company will succeed? Advise.

OR

State the manner in which a person may acquire membership of a public company.

Answer

Under section 2 (55) of the Companies Act, 2013 a “member”, in relation to a company, means -

(i) the subscriber to the memorandum of the company who shall be deemed to have agreed to become member of the company, and on its registration, shall be entered as member in its register of members;
(ii) every other person who agrees in writing to become a member of the company and
whose name is entered in the register of members of the company;

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

From the above it is clear that a person can become a member only after his name is entered
as a beneficial owner in the register of members of the company and in the records of a
depository. However, in order to have his name entered in these documents the avenues
available to a person to become a member are as under:

a. By subscribing to the Memorandum (for forming a company);

b. By agreeing in writing to become a member of the company – this is done in any one of
the following ways:
   1. Applying for shares or securities in the company in response to a public issue;
   2. Purchasing the shares or securities of the company from the stock exchange in
      which such shares and securities are listed for trading;
   3. Purchasing shares or securities in terms of a private placement made by the
      company.

c. By registration as a member in the register of members and the records of the depository
   consequent upon transmission of such shares on the death of the registered member.

Member as a minor: Since becoming a member of a company requires a contractual
relationship to exist between the person and the company, it is essential that a person who is
not competent to enter into a contract cannot become a member in a company.

Under section 11 of the Indian Contract Act, 1872 every person is competent to contract who
is of the age of majority according to the law to which he is subject, and who is sound mind
and is not disqualified from contracting by any law to which he is subject.

Therefore, a minor cannot become a member of a company. However, in case a minor has
been admitted to a partnership it has been held that he enjoys the benefits of a partner without
incurring any liability as long as he is a minor. This has been upheld in other cases as well.

In the present case therefore, as the shares are registered in the name of the minor, he shall
enjoy all the benefits of a member without incurring any liability. The question of his father
becoming liable does not arise as he is not a member of the company.

Therefore, the company will not succeed in making the father of the minor member liable.

Question 44

How far can a minor become a member of a company under the Companies Act, 2013?

OR
Explain the position of a minor in relation to obtaining membership in a company under the provisions of the Companies Act, 2013.

Answer

Position of a minor as a member in a company: In terms of section 11 of the Indian Contract Act, 1872 a minor is not competent to enter into contracts and hence, cannot become a member of a company as membership involves a contractual relationship between the member and the company.

A company is not allowed to register a minor as a member except under guardianship of a person competent to enter into a contract.

Hence, to take an example if X a minor wants to be registered as a member in a company, he must enter into the contract with the company through a guardian who will execute all the documents. The company in turn will register the minor as a member clearly mentioning the fact of his minority and mentioning the guardianship of the person under whom the minor has purchased the securities.

Irrespective of the mode of becoming a member, the minor can be registered as a member only under the guardianship of a person capable of entering into a contract.

Question 45

M/s Honest Cycles Ltd. has received an application for transfer of 1,000 equity shares of ₹10 each fully paid up in favour of Mr. Balak. On scrutiny of the application form it was found that the applicant is minor. Advise the company regarding the contractual liability of a minor and whether shares can be allotted to the Balak by way of transfer.

Answer

The Companies Act, 2013 does not prescribe any qualification for membership. Membership entails an agreement enforceable in a court of law. Therefore, the contractual capacity as envisaged by the Indian Contract Act, 1872 should be taken into consideration.

It was held in the case of Mohori Bibi Vs. Dharmadas Ghose (1930) 30 Cal. 531 (P.O.) that since minor has no contractual capacity, the agreement with a minor is void. Therefore, a minor or a lunatic cannot enter into an agreement to become a member of the company.

However, it is an established matter of law as evidenced in a number of cases, that in case a minor is bound in a contractual relationship he shall enjoy the benefits under the contract without being liable for anything.

Hence, if the company registers the minor as a member, he will incur no liability for the company as long as he is a minor. Going by practical legal application, companies do not register minor as members at all.
In view of the above, M/s Honest Cycles Ltd may still give membership to Balak through the transfer of 1000 shares, as the shares are fully paid up and no further liability is attached to them in any case.

**Question 46**

*RSP Limited, allotted 500 fully paid-up shares of ₹100 each to Z, 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 this 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 Z would be given any relief by the court under the provisions of the Companies Act, 2013*

**Answer**

The issue of membership of a minor is not covered in the Companies Act, 2013 and the legal implications of a minor’s membership will have to be examined from the Indian Contract Act, 1872.

Under section 11 of the Indian Contract Act, 1872 a minor, being incompetent to contract, cannot become member of a company. Any contract entered into by a minor is void ab initio as was held in *Mohri Bibi vs Dhramadas Ghosh* (1930)

In the case *Palaniappa vs Official Liquidator AIR 1942*, it was observed that if the directors allot shares to a minor in response to his application, without knowing that he was a minor and enter his name in the Register of Members, as soon as the company comes to know of this fact, it can eschew / cancel the allotment and strike the name of the minor off the Register of Members. However, as a contract with a minor is void, the company cannot be allowed to take undue advantage under the contract. Hence the company must refund the entire money to the minor.

On the basis of above the contention of Z is not valid. The company is empowered to cancel the allotment and strike the name of Z off the Register of Member. But the decision of the company to forfeit the entire share money of Z is wrong. The company must refund the money to the Z.

**Question 47**

“Every shareholder of a company is also known as a member, while every member may not be known as a shareholder.” Examine the validity of the statement and point out the distinction between a ‘member’ and a ‘shareholder’.

Or

In what way a ‘Member’ of a company is different from that of a ‘shareholder’ of the company?

**Answer**

Under section 2 (55) of the Companies Act, 2013 a “member”, in relation to a company, means —
(i) the subscriber to the memorandum of the company who shall be deemed to have agreed to become member of the company, and on its registration, shall be entered as member in its register of members;

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

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

From the above definition of a member it is clear that in a company having a share capital, the only way to become a member is through holding shares of the company. Further, the membership becomes effective only when the name of the person is entered in the register of members. Therefore, if a person has purchased shares in the stock exchange, from the period of purchase till the registration, though he is a shareholder he is not a member and enjoys no privileges of a member.

Similarly, in the case of companies not having share capital, the members would not be shareholders.

**Service of Documents**

**Question 48**

*Explain the provisions of the Companies Act, 2013 relating to the ‘Service of Documents’ on a company and the members of the company. When is service of document deemed to be effective in case the document is sent by post? Explain.*

**Answer**

Under section 20 of the Companies Act, 2013 a document may be served on a company or an officer thereof by sending it to the company or the officer at the registered office of the company by registered post or by speed post or by courier service or by leaving it at its registered office or by means of such electronic or other mode as may be prescribed. However, in case where securities are held with a depository, the records of the beneficial ownership may be served by such depository on the company by means of electronic or other mode.

Under section 20 (2) a document may be served on Registrar or any member by sending it to him by post or by registered post or by speed post or by courier or by delivering at his office or address, or by such electronic or other mode as may be prescribed. However, a member may request for delivery of any document through a particular mode, for which he shall pay such fees as may be determined by the company in its annual general meeting.

The Companies Act, 2013 does not lay down provisions relating to the service of documents either on the company or on members by the company. By drawing parallels from the Indian Contract Act, 1872 and other applicable laws, the service of any document which is sent by
post is complete against the sender when it is put in course of transmission or in post to be out of the power of the sender.

Therefore, where a document is sent by post, it is enough if the letter containing the document is properly addressed and sent by ordinary post.

Question 49

The Articles of Association of Mars Company Ltd. provides that documents may be served upon the company only through Fax. Ramesh dispatches a document to the company by post, under certificate of posting. The company does not accept it on the ground that it is in violation of the Articles of Association. As a result Ramesh suffers loss. Explain with reference to the provisions of the Companies Act, 2013:

(i) What refusal of document by the company is valid?
(ii) Whether Ramesh can claim damages on this basis?

OR

The Articles Association of PQR Ltd. provided that documents upon the company may be served only through E-mail. Arvind sent a document to the company by registered post. The company did not accept the document on the ground that sending documents to the company by post was in violation of the Articles. As a result Arvind suffered loss. Decide the validity of argument of the company and claim of Arvind for damages in the light of provisions of the Companies Act, 2013.

Answer

Problem on refusal of service of document upon a company: The given case is covered by section 20 of the Companies Act, 2013 under which a document may be served on a company or an officer thereof by sending it to the company or the officer at the registered office of the company by registered post or by speed post or by courier service or by leaving it at its registered office or by means of such electronic or other mode as may be prescribed. Hence, the Company cannot refuse to accept the document merely because it was not sent by Fax as required by its Articles and its act of refusal is invalid.

In the second part of the problem, Ramesh/ Arvind can claim damages on this basis from the Company as his loss is the direct result of such refusal by the company.

Question 50

Discuss the provisions of law contained in the Companies Act, 2013 as regards to the service of documents.

Answer

Under section 20 of the Companies Act, 2013 a document may be served on a company or an officer thereof by sending it to the company or the officer at the registered office of the company by registered post or by speed post or by courier service or by leaving it at its
registered office or by means of such electronic or other mode as may be prescribed. However, in case where securities are held with a depository, the records of the beneficial ownership may be served by such depository on the company by means of electronic or other mode.

Under section 20 (2) a document may be served on Registrar or any member by sending it to him by post or by registered post or by speed post or by courier or by delivering at his office or address, or by such electronic or other mode as may be prescribed. However, a member may request for delivery of any document through a particular mode, for which he shall pay such fees as may be determined by the company in its annual general meeting.

Hence, it can be seen from above that the Companies Act, 2013 provides various modes to sending communications and serving documents both to the company and by the company to the Registrar and members. It may be noted that even if a particular mode is prescribed in the Articles by the company, a service of document by any other mode permissible under section 20 cannot be refused by the company merely on grounds that it is not in the prescribed mode. The Articles of the company cannot override the provisions of the Companies Act.

Exercise

1. A minor by false declaration of his age in the share application form acquired fully paid up shares. The company on coming to know of the fact wants to remove his name. Can they do so?

[Hints: Yes, because minor has no contractual capacity]

2. X applied for 500 shares in a limited company in a fictitious name. The shares were allotted in that fictitious name. Referring to the relevant provisions of Companies Act, 2013 state whether X will incur any liability.

[Hints: X shall be punishable as per Section 38 (1) of The Companies Act, 2013]

3. A limited company willing to purchase a tea estate in Assam. Extracts from experts report mentioning number of tea plants and other relevant information was incorporated in the prospectus. The expert report was found to be incorrect. Does any prospective applicant shareholder buying the shares on the basis of false information has any remedy against the company?

[Hints: Yes, as per Section 65 of the Companies Act, 2013]

4. A company issued a prospectus. All the statements contained therein were literally true. It also stated that the company had paid dividends for a number of years, but did not disclose the fact that the dividends were not paid out of trading profits, but out of capital profits. An allottee of shares wants to avoid the contract on the ground that the prospectus was false in material particulars. Decide.

[Hints: Yes allottee can avoid the contract as per the provision given under the Section 35 (1) of the Companies Act, 2013]
5. The Articles of Association of Star Company Ltd. provides that documents may be served upon the company only through Fax. Vikas despatches a document to the company by post, under certificate of posting. The company does not accept it on the ground that it is in violation of the Articles of Association. As a result Vikas suffers loss. Explain with reference to the provisions of the Companies Act, 2013:

(i) Whether refusal of document by the Company is Valid?
(ii) Whether Vikas can claim damages on this basis?

[Hints: Refusal is not valid under section 20 (1) of the Companies Act, 2013 and Vikas can claim damages]

6. A Public Limited Company wants to increase its subscribed share capital by offering the new shares to the persons who are not the members of the company. Referring to the provisions of the Companies Act, 2013, advice the company about the procedure the company has to adopt to give effect to the above proposal.

[Hints: Yes, company can offer the new shares to the non-members as per the provisions of the Companies Act, 2013 contained in Section 62]

7. A company issued 20 partly paid equity shares and registered them in the name of the minor describing him as minor. The father of the minor signed the application on the minor’s behalf. After some time company went into liquidation. The company filed a suit against father of the minor to recover the remaining amount on the shares. Whether the company will succeed? Advice.

[Hints: No, as the transaction was void and the father who signed the application on the minor’s behalf could not be treated as having contracted for the shares (Palaniappa B. Official Liquidator AIR 1942 Mod. 470)]

8. State whether television advertisements and visual clips giving all required details can be treated as a prospectus?

[Hints: No, because a prospectus must be in writing. Also refer to section 25 (prospectus is a document)]
UNIT – 3: SHARE CAPITAL

Shares

Question 1

Explain in brief ‘Equity Share Capital’ and ‘Preference Share Capital’.

Answer

As per the Section 43 of the Companies Act 2013, the share capital of a company limited by shares shall be of two types:

(i) equity share capital; and
(ii) preferential share capital.

Further the section provides for two kinds of Equity Share Capital as:

(i) those with voting rights; or
(ii) those with differential rights as to dividend, voting or otherwise in accordance with such rules as may be prescribed.

Explanation to section 43 of the Companies Act, 2013 defines the “preference share capital” with reference to the share capital of a company as that part of the issued share capital of the company which carries a preferential right with respect to:

a. the payment of dividend, either as a fixed amount or as a fixed percentage and which may be tax free or subject to tax;

b. repayment in the event of the winding up of the company or repayment of capital.

Under section 47 (1) of the Companies Act, 2013 every member of the company limited by shares, who holds equity shares therein, shall have the right to vote on every resolution placed before the company and his voting right on a poll shall be proportionate to his share in the paid up equity capital of the company. On the other hand under section 47 (2) of the Act, every member of a company limited by shares who is holding preference shares shall be entitled to vote on only those resolutions placed before the company which affect directly the rights attached to preference shares held by him. Further, in case of any resolution by a poll on the winding up of the company or for the repayment or reduction of equity or preference share capital, his voting right shall be proportionate to his share in the paid up preference share capital of the company.

The Companies Act, 2013 vide section 55 (1) further provides that no company limited by shares shall, after the commencement of this Act, issue any preference shares which are not redeemable. Hence, under the new company law, preference shares must be redeemed.
Question 2

State whether the following statements are correct or incorrect:

As per Section 51 of the Companies Act, 2013, a company may, if so authorized by its Articles, pay dividends in proportion to the amount paid up on each shares.

Answer

Correct

Voting rights of a holder

Question 3

What are the rights of preference shareholders if dividends remained unpaid? Would your answer be different if preference shares are non-cumulative?

Or

ABC Ltd. has not given dividend to its preference shareholders. In this regard state the rights of preference shareholders and non-cumulative Preference Shareholders on dividend.

Answer

Under section 47 (2) of the Act, every member of a company limited by shares who is holding preference shares shall be entitled to vote on only those resolutions placed before the company which affect directly the rights attached to preference shares held by him. Further, in case of any resolution by a poll on the winding up of the company or for the repayment or reduction of equity or preference share capital, his voting right shall be proportionate to his share in the paid up preference share capital of the company.

Provided that where the dividend in respect of a class of preference shares has not been paid for a period of two years or more, such class of preference shareholders shall have a right to vote on all the resolutions placed before the company.

The above provision lays down the rights of preference share holders who have not been paid dividend for a continuous period of 2 years and this does not change whether the shares are cumulative or non-cumulative.

Question 4

Examine the different aspects of the voting rights of a member.

Answer

Voting rights of a member: Section 47 governs the voting rights of members. Under section 47 (1) every holder of an equity share has the right to vote, on every resolution placed before the company. If the voting on the resolution is put to a poll his voting right in that case shall be in proportion to his share in the paid up capital of the company. A member may exercise his right to vote personally or through a proxy.
Section 47 (2) provides for every holder of preference shares in the share capital of the company has a right to vote only on a resolution which directly affects the rights attached to the preference share capital.

The sub section further provides that in the case of any resolution for the winding up of the company or for the repayment or reduction of its equity or preference share capital, the preference shareholder’s voting right on a poll shall be in proportion to his share in the paid-up preference share capital of the company.

Further, the proportion of the voting rights of equity shareholders to the voting rights of the preference shareholders shall be in the same proportion as the paid-up capital in respect of the equity shares bears to the paid-up capital in respect of the preference shares.

Provided further that where the dividend in respect of a class of preference shares has not been paid for a period of two years or more, such class of preference shareholders shall have a right to vote on all the resolutions placed before the company.

**Further issue of capital**

**Question 5**

Write a note on the powers of the Central Government in regard to conversion of debentures and loans into shares of the company under the following heads:

(i) When terms of issue of such debenture or terms of loan do not include term providing for an option of conversion;

(ii) Matters considered in determining the terms and conditions of such conversion.

(iii) Remedy available to the company if conversion or terms of conversion is not acceptable to it.

**Answer**

(i) Under Section 62 (4) of the Companies Act, 2013 where any debentures have been issued or loans have been obtained from the Government by a company, the Central Government may, if in its opinion it is necessary in public interest so to do, by order direct that such debentures or loans or any part thereof shall be converted into shares in the company on such terms and conditions as appear to that Government to be reasonable in the circumstances of the case, even if the terms of issue of such debentures or the terms of such loans do not include a term for providing for an option for such conversion.

Therefore, the Central Government is fully empowered to convert the debentures of loans given by it to a company into shares even if the terms of issue of such debentures or loans do not include a term for providing for an option for such conversion.

(ii) In terms of section 62 (5) in determining the terms and conditions of such conversion, the Central Government shall have due regard to the following matters / circumstances:
(i) The financial position of the company;
(ii) The terms of issue of the debentures or such loans, as the case may be;
(iii) The rate of interest payable on such debentures or the loans;
(iv) Public interest and
(v) Such other matters as may be considered necessary.

(iii) Remedies open to the company: If the terms and conditions of such conversion are not acceptable to the company, the company may, within 60 days from the date of communication of such order appeal to the Tribunal which shall after hearing the company and the Government pass such orders as it may deem fit.

Question 6

When can a Public Company offer the new shares (further issue of shares) to persons other than the existing shareholders of the Company? Can these shares be offered to the Preference Shareholders?

Answer

Issue of Further Shares: Section 62 (1) (a) of the Companies Act, 2013 provides that if, at any time, a company having a share capital proposes to increase its subscribed capital by the issue of further shares, such shares should be offered to the existing equity shareholders of the company as at the date of the offer, in proportion to the capital paid up on those shares.

However, certain exceptions have been provided in the Companies Act, 2013 when such further shares of a company may be offered to other persons as well. These are as under-

(a) Under section 62 (1) (b) issue of further shares may be offered to employees under a scheme of employees’ stock option subject to a special resolution passed by the company and subject to such conditions as may be prescribed.

(b) Under section 62 (1) (c) such shares may be offered to any persons, if it is authorised by a special resolution, either for cash or for a consideration other than cash, if the price of such shares is determined by the valuation report of a registered valuer subject to such conditions as may be prescribed.

(c) if any equity shareholder to whom the shares are offered in terms of section 62 (1) (a) as described above, declines such offer, the Board of Directors may dispose of the shares in such manner as is not disadvantageous to the shareholders or to the company.

Preference Shareholders - whether (Further Issue of Capital) can be offered to: From the wordings of Section 62 (1) (c), it is quite clear that these shares can be issued to any persons who may be preference shareholders as well provided such issue is authorized by a special resolution of the company and are issued on such conditions as may be prescribed.
Question 7

VRS Company Ltd. is holding 45% of total equity shares in SV Company Ltd. The Board of Directors of SV Company Ltd. (incorporated on January 1, 2007) decided to raise the share capital by issuing further Equity shares. The Board of Directors resolved not to offer any shares to VRS Company Ltd, on the ground that it was already holding a high percentage of the total number of shares already issued, in SV Company Ltd. The Articles of Association of SV Company Ltd. provides that the new shares be offered to the existing shareholders of the company. On March 1, 2007 new shares were offered to all the shareholders except VRS Company Ltd. Referring to the provisions of the Companies Act, 2013 examine the validity of the decision of the Board of Directors of SV Company Limited of not offering any further shares to VRS Company Limited.

Answer

The legal issues in the presented problem in the question is covered under Section 62 (1) of the Companies Act, 2013 and pertains to the case Gas Meter Co. Ltd. Vs Diaphragm & General leather co. Ltd.

Section 62 (1) (a) of the Companies Act, 2013 provides that if, at any time, a company having a share capital proposes to increase its subscribed capital by the issue of further shares, such shares should be offered to the existing equity shareholders of the company as at the date of the offer, in proportion to the capital paid up on those shares. The company cannot ignore a section of the existing shareholders and must offer the shares to the existing equity shareholders in proportion to their holdings.

Further in case of Gas Meter Ltd. Vs Diaphragm, & General; leather Co. Ltd where the facts of the case were similar to those given in the present case, the articles of Diaphagm Co. provided that the new shares should first be offered to the existing share holders. However, the company offered new shares to all shareholders excepting Gas Co., which held its controlling shares. It was held that Diaphagm company had no legal authority under the Companies Act to do so.

Therefore, in the given case, SV Ltd.’s decision not to offer any further shares to VRS Co. Ltd on the ground that VRS Co. Ltd already held a high percentage of shareholding in SV Co. Ltd. is not valid for the reason that it is violative of the provisions of Section 62 (1) (a) as also substantiated by the ruling in the above referred case.

Question 8

A listed company at Bombay Stock Exchange, intends to offer its new shares to non-members. State whether it is permitted under the Companies Act, 2013.

Answer

Issue of Shares to Non-Member: As per the provisions of the Companies Act, 1956 contained in section 62 (1) (a) (iii), (b) and (c) further shares in a company limited by shares may be issued to non members under certain circumstances. These are as explained below:
(a) Under section 62 (1) (b) issue of further shares may be offered to employees under a scheme of employees’ stock option subject to a special resolution passed by the company and subject to such conditions as may be prescribed.

(b) Under section 62 (1) (c) such shares may be offered to any persons, if it is authorised by a special resolution, either for cash or for a consideration other than cash, if the price of such shares is determined by the valuation report of a registered valuer subject to such conditions as may be prescribed.

(c) if any equity shareholder to whom the shares are offered in terms of section 62 (1) (a) as described above, declines such offer, the Board of Directors may dispose of the shares in such manner as is not disadvantageous to the shareholders or to the company.

Question 9

J held 100 partly paid up shares of LKM Limited. The company asked him to pay the final call money on the shares. Due to some unavoidable circumstances he was unable to pay the amount of call money to the company. At a general meeting of the shareholders, the chairman disallowed him to cast his vote on the ground that the articles do not permit a shareholder to vote if he has not paid the calls on the shares held by him. J contested the decision of the Chairman. Referring to the provisions of the Companies Act, 2013 decide whether the contention of J is valid.

Answer

Section 106 (1) of the Companies Act, 2013 states that the articles of a company may provide that no member shall exercise any voting right in respect of any shares registered in his name on which any calls or other sums presently payable by him have not been paid, or in regard to which the company has exercised any right of lien.

In the present case the articles of the company do not permit a shareholder to vote if he has not paid the calls on the shares held by him. Therefore, the chairman at the meeting is well within its right to refuse him the right to vote at the meeting and J’s contention is not valid.

Alteration of share capital

Question 10

The Directors of Mars India Ltd. desire to alter capital clause of Memorandum of Association of their company. Advise them, under the provisions of the Companies Act, 2013 about the ways in which the said clause may be altered and the procedure to be followed for the said alteration.

Answer

Alteration of Capital [Section 61 (1) read with section 13 of the Companies Act, 2013]: Under section 61 (1) a limited company having a share capital may, if authorized by its Articles, alter its Memorandum in its general meeting as under:
(i) it may increase its authorized share capital by such amount as it thinks expedient;
(ii) it may consolidate and divide all or any of its share capital of a larger amount than its existing shares
(iii) convert all or any of its paid up shares into stock and reconvert that stock into fully paid shares of any denomination
(iv) sub-divide the whole or any part of its shares into shares of smaller amount than is fixed by the Memorandum
(v) cancel those shares which, at the time of passing of the resolution in that behalf have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled.

Further, under section 64 where a company alters its share capital in any of the above mentioned ways, the company shall file a notice in the prescribed form with the Registrar within a period of thirty days of such alteration or increase or redemption, as the case may be, along with an altered memorandum.

Section 13 provides for the procedure to be followed for alteration of the Memorandum, as under:

a. A special resolution must be passed to effect the alteration. For this purpose a Board Meeting must be held to convene a general meeting of the members and all legal provisions in this behalf followed including the circulation of a detailed explanatory note on the proposed change along with the notice for the general meeting;
b. The company must file with the Registrar the special resolution passed by the company to effect an alteration in the capital clause of the Memorandum;
c. No alteration to the Memorandum will have effect unless it has been registered with the Registrar as above.

Reduction of the share capital

Question 11

Can a Public Limited Company reduce its Share Capital? If so, when and how? Also state the procedure it has to follow for doing so.

Answer

Reduction of Share Capital: A company is allowed to reduce its share capital subject to special safeguards. Section 100 of the Companies Act, 1956 provides that a company, limited by shares or guarantee and having share capital, if so authorised by the articles, may by special resolution and the confirmation of the Court, reduce its share capital in any way and in particular by.

(a) extinguishing or reducing the liability of members in respect of the capital not paid up;
(b) writing off or cancellation any paid-up capital which is in excess of the needs of the company,
(c) paying off any paid-up share capital which is in excess of the needs of the company.

Reduction in (b) and (c) may be made either in addition or without extinguishing or reducing the liability of the member for uncalled capital.

Reduction of share capital may in reality take three forms, viz.:

1. Reducing the value of shares in order to absorb the accumulated losses suffered by the company without any payment to the shareholders.
2. Extinction of liability of capital not paid; and
3. Paying off any paid up share capital.

The interest of creditors is involved only in the cases stated in 2 and 3.

**Procedure to be adopted**

1. A special resolution is to be passed under Section 100.
2. An application is to be made under Section 101 to the Court for an order confirming the reduction.
3. After the petition for Court’s confirmation is filed, the Court must settle the list of creditors who are entitled to object such as creditors having a debt or a claim admissible on a winding up.
4. The Court must ascertain the names of those creditors and the nature and amount of their debts or claims.
5. The Court may publish notices fixing a day or days within which the creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction.
6. The Court has power to dispense with the consent of the dissenting creditor, on the company securing the paying of the debt or claim by appropriating the full amount of the amount fixed by the Court.

However, the Court has discretionary power having regard to any special circumstances of the case to direct that the provisions of Section 101(2) shall not apply as regards any classes of creditors. The special circumstances should be convincing to the Court.

After being satisfied the Court may make an order confirming the reduction on such terms and conditions as it thinks fit. The company then has to put the words “and reduced” to the name of the company.

**[Note: This section 100 of the Companies Act, 1956 is still in existence for November 2015 examination as the corresponding section 66 of the Companies Act, 2013 is not notified till 31st April, 2015]**
Issues of shares at a discount

Question 12

Can a company issue shares at discount? What is the law, in this relation, laid down in the Companies Act, 2013?

Or

What are the rules relating to issue of shares at a discount?

Or

Whether a company may issue shares at discount? State the conditions which must be fulfilled before issuing the shares at discount contained in the Companies Act, 2013.

Answer

Under section 53 (1) of the Companies Act, 2013 a company cannot issue shares at a discount except as provided in section 54.

Under section 53 (2) any share issued by a company at a discounted price shall be void.

Hence, the general rule under section 53 is that a company cannot issue shares at a discount. However, section 54 provides that notwithstanding anything contained in section 53, a company may issue sweat equity shares of a class of shares already issued, if the following conditions are fulfilled, namely:—

(a) the issue is authorised by a special resolution passed by the company;

(b) the resolution specifies the number of shares, the current market price, consideration, if any, and the class or classes of directors or employees to whom such equity shares are to be issued;

(c) not less than one year has, at the date of such issue, elapsed since the date on which the company had commenced business; and

(d) where the equity shares of the company are listed on a recognised stock exchange, the sweat equity shares are issued in accordance with the regulations made by the Securities and Exchange Board in this behalf and if they are not so listed, the sweat equity shares are issued in accordance with such rules as may be prescribed.

Thus only sweat equity shares can be issued at a discount under section 54.

Section 2 (88) further defines “sweat equity shares” as such equity shares as are issued by a company to its directors or employees at a discount or for consideration, other than cash, for providing their know-how or making available rights in the nature of intellectual property rights or value additions, by whatever name called.
Issue of sweat equity

Question 13

Explain the meaning of ‘Sweat Equity Shares’ and state the conditions a company has to fulfill for issuing such shares.

Answer

Meaning of Sweat Equity Shares: Section 2 (88) of the Companies Act, 2013 defines “sweat equity shares” as those equity shares which are issued by a company to its directors or employees at a discount or for consideration other than cash for providing their know-how or making available right in the nature of intellectual property rights or value additions, by whatever name called.

Conditions to be fulfilled before issue of Sweat Equity Shares: Notwithstanding anything contained in Section 53 (Providing for issue of shares at a discount), a company may under section 54 of the Companies Act, 2013 issue sweat equity shares if the following conditions are fulfilled:

1. The shares being issued belong to a class of shares which have already been issued.
2. The issue should be authorised by a special resolution passed by the company in general meeting.
3. The resolution should specify number of shares, current market price, consideration, if any and the class or classes of directors or employees to whom such shares are to be issued.
4. Not less than one year has elapsed at the date of such issue, since the date on which the company had commenced business.
5. Where the equity shares of the company are listed on a recognised stock exchange, the sweat equity shares are issued in accordance with the regulations made by the Securities and Exchange Board in this behalf and if they are not so listed, the sweat equity shares are issued in accordance with such rules as may be prescribed. Under section 54 (2) the rights, limitations, restrictions and provisions as are for the time being applicable to equity shares shall be applicable to the sweat equity shares issued under this section and the holders of such shares shall rank pari passu with other equity shareholders.

Issue of a securities at a premium

Question 14

Whether a company can issue shares at premium?

State the purposes for which the Share Premium account can be used under the provisions of the Companies Act, 2013.
Explain the provisions of the Companies Act, 2013, relating to the utilization, by a company, of the amount standing to the credit of Securities Premium Account.

Answer

There is no restriction contained in the Companies Act, 2013 on the sale of shares at a premium, i.e., at a price higher than their nominal value.

However, SEBI guidelines have to be observed as they indicate when an issue has to be at a premium.

According to the guidelines issued by SEBI a company may offer shares to the public at a premium under the following circumstances:

1. The company or its promoter company has a minimum of three year consistent record of profitable workings;
2. The promoters take up at least 50% of the shares offered in the issue;
3. The entire issue is on the same terms including the premium charged;
4. The justification for the proposed premium is fully justified and explained in the prospectus.

The premium on any shares issued may either be received in cash or in kind.

Section 52 (1) of the Companies Act, 2013 requires a company which issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount of the premium received on those shares shall be transferred to a “securities premium account”.

Under section 52 (2) the Securities Premium Account may be applied by the company only for the following purposes:

(a) Towards the issue of unissued shares of the company to the members of the company as fully paid bonus shares; or
(b) In writing off the preliminary expenses of the company; or
(c) In writing off the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company; or
(d) In providing for the premium payable on the redemption of any redeemable preference shares or debentures of the company; or
(e) For the purchase of its own shares or other securities under section 68 of the Companies Act, 2013

Share certificate

Question 15

Ramesh, who is a resident of New Delhi, sent a transfer deed, for registration of transfer of shares to the company at the address of its Registered Office in Mumbai. He did not receive
the shares certificates even after the expiry of four months from the date of dispatch of transfer deed. He lodged a criminal complaint in the Court at New Delhi. Decide, under the provisions of the Companies Act, 2013, whether the Court at New Delhi is competent to take action in the said matter?

Answer

Jurisdiction of Court, now Tribunal, the Companies Act, 2013: According to Section 56 (4) of the Companies Act, 2013 every company, unless prohibited by any provision of law or of any order of court, Tribunal or other authority, shall deliver the certificates of all shares transferred within a period of one month from the date of receipt by the company of the instrument of transfer.

Further under section 56 (6) Where any default is made in complying with the provisions of sub-sections (1) to (5) of section 56 (which deals with transfer and transmission of shares), the company shall be punishable with fine which shall not be less than twenty-five thousand rupees but which may extend to five lakh rupees and every officer of the company who is in default shall be punishable with fine which shall not be less than ten thousand rupees but which may extend to one lakh rupees.

The jurisdiction binding on the company is that of the state in which the registered office of the company is situated. Hence, in the given case the Delhi court is not competent to take action in the matter.

The facts of the given case are similar to H.V. Jaya Ram Vs. ICICI Ltd., 1998. In this case the Special Court for Economic Offences in the State of Karnataka rejected the appellant’s complaint against the respondent company on the ground that since the company had its registered office at Mumbai it is only the court which has territorial jurisdiction over the registered office of the company that can entertain the petition and not the court located in the State of Karnataka where the shareholder is residing. The High Court also upheld the order of the Special Court. On appeal Supreme Court held that cause of action for failure to deliver share certificate arises where the registered office of the company is situated and not in the jurisdiction of the Court located in the place where the complaint resides.

Share warrant

Question 16

Differentiate between 'Share Warrant' and 'Share Certificate' under the Companies Act, 2013.

Answer

Distinction between a share warrant and a share certificate:

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>SHARE CERTIFICATE</th>
<th>SHARE WARRANT</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i)</td>
<td>A share certificate is a prima facie evidence of document of title, stating that</td>
<td>A share warrant is a bearer document stating that the holder is</td>
</tr>
</tbody>
</table>
(i) the holder is entitled to specified number of shares
(ii) Share certificate can be issued by a public and private company
(iii) A share certificate can be issued for a fully paid and partly paid up shares
(iv) The holder of a share certificate is normally a member of the company
(v) A share certificate is not a negotiable instrument
(vi) The shares can be transferred by execution of a transfer deed and its delivery along with the share certificate. The transfer is complete when it is registered by the company.
(vii) Stamps duty is payable on transfer of shares specified in a share certificate
(viii) In order to qualify as a Director, the person should acquire shares in his own name.

<table>
<thead>
<tr>
<th>entitlement</th>
<th>status</th>
</tr>
</thead>
<tbody>
<tr>
<td>the holder is entitled to specified number of shares</td>
<td>entitled to certain number of shares specified therein.</td>
</tr>
<tr>
<td>(ii) Share certificate can be issued by a public and private company</td>
<td>Share warrant can be issued only by public companies.</td>
</tr>
<tr>
<td>(iii) A share certificate can be issued for a fully paid and partly paid up shares</td>
<td>A share warrant can be issued only with respect of fully paid up shares</td>
</tr>
<tr>
<td>(iv) The holder of a share certificate is normally a member of the company</td>
<td>The bearer of a share warrant can be a member only if the articles provide.</td>
</tr>
<tr>
<td>(v) A share certificate is not a negotiable instrument</td>
<td>A share warrant is by mercantile usage a negotiable instrument</td>
</tr>
<tr>
<td>(vi) The shares can be transferred by execution of a transfer deed and its delivery along with the share certificate. The transfer is complete when it is registered by the company.</td>
<td>A share warrant can be transferred by mere delivery and no registration of transfer with the company is required.</td>
</tr>
<tr>
<td>(vii) Stamps duty is payable on transfer of shares specified in a share certificate</td>
<td>No stamp duty is payable on transfer of a share warrant</td>
</tr>
<tr>
<td>(viii) In order to qualify as a Director, the person should acquire shares in his own name.</td>
<td>This is not applicable to share warrants.</td>
</tr>
</tbody>
</table>

[Note: Refer RBI circular on Warrants dated 14th July 2014]

Question 17

Mr. 'Y', the transferee, acquired 250 equity shares of BRS Limited from Mr. 'X', the transferor. But the signature of Mr. 'X', the transferor, on the transfer deed was forged. Mr. 'Y' after getting the shares registered by the company in his name, sold 150 equity shares to Mr. 'Z' on the basis of the share certificate issued by BRS Limited. Mr. 'Y' and 'Z' were not aware of the forgery. State the rights of Mr. 'X', 'Y' and 'Z' against the company with reference to the aforesaid shares.

Answer

According to Section 46(1) of the Companies Act, 2013, a share certificate once issued under the common seal of the company, specifying the shares held by any person, shall be prima facie evidence of the title of the person to such shares. Therefore, in the normal course the person named in the share certificate is for all practical purposes the legal owner of the shares therein and the company cannot deny his title to the shares.

However, a forged transfer is a nullity. It does not give the transferee (Y) any title to the shares. Similarly any transfer made by Y (to Z) will also not give a good title to the shares as the title of the buyer is only as good as that of the seller.
Therefore, if the company acts on a forged transfer and removes the name of the real owner (X) from the Register of Members, then the company is bound to restore the name of X as the holder of the shares and to pay him any dividends which he ought to have received *Barton v. North Staffordshire Railway Co. 38 Ch D 456*).

In the above case, ‘therefore, X has the right against the company to get the shares recorded in his name. However, neither Y nor Z’ have any rights against the company even though they are bona fide purchasers.

However, since X seems to be the perpetrator of the forgery, he will be liable both criminally and for compensation to Y and Z.

**Question 18**

*What is the law and procedure for issuing a duplicate share certificate under the provisions of the Companies Act, 2013 in case the original share certificate is lost or destroyed?*

**Answer**

Under section 46(2) of the Companies Act, 2013 a company may issue a duplicate certificate of shares if it is proved to have been lost or destroyed or having been defaced, mutilated or torn, is surrendered to the company.

Further under section 46 (3) notwithstanding anything contained in the articles of a company

a. the manner of issue of a certificate of shares or the duplicate thereof,

b. the form of such certificate;

c. the particulars to be entered in the register of members; and

d. other matters

shall be such as may be prescribed.

**Procedure:** The Companies Act, 2013 does not lay down an elaborate procedure for the issue of duplicate certificates.

In case of a lost or destroyed share certificate, an application is required by the company alongwith an affidavit and an indemnity bond to issue a duplicate share certificate to the shareholder.

In case of a mutilated or torn share certificate the application with the original certificate in its mutilated or torn form sent to the company will get the shareholder a duplicate one.

Once the duplicate share certificate is issued, necessary record of the same will be made by the company in its register of members.

**Call on share**

**Question 19**

“Moonstar Ltd” is authorised by its articles to accept the whole or any part of the amount of remaining unpaid calls from any member although no part of that amount has been called up.
‘A’, a shareholder of the Moonstar Ltd., deposits in advance the remaining amount due on his shares without any calls made by "Moonstar Ltd.".

Referring to the provisions of the Companies Act, 2013, state the rights and liabilities of Mr. A, which will arise on the payment of calls made in advance.

Answer

Section 50 (1) of the Companies Act, 2013 states that a company may, if so authorised by its articles, accept from any member, the whole or a part of the amount remaining unpaid on any shares held by him, even if no part of that amount has been called up. Hence, the Companies Act recognizes the right of a company to receive calls in advance provided it is authorized by its Articles to do so.

In the given case Mr. A, a shareholder of the ‘Moonstar Ltd.’, has deposited in advance the remaining amount due on his shares without any calls made by ‘Moonstar Ltd’. ‘Moonstar Ltd’ was authorized to accept the unpaid calls by its articles. Hence, there is no irregularity in the transaction.

However, section 50 (2) further provides that a member of the company limited by shares shall not be entitled to any voting rights in respect of the amount paid by him under sub-section (1) until that amount has been called up. Hence, Mr A will not derive any additional voting rights by virtue of such advance calls paid by him.

When a company receives payment in advance of calls, the rights and liabilities of the shareholder will be as follows:

(i) The shareholder is not entitled to voting rights in respect of the moneys so paid by him until the same is called up.[Section 50(2)].

(ii) The shareholder’s liability to the company in respect of the call for which the amount is paid is distinguished.

(iii) The shareholder is entitled to claim interest on the amount of the call to the extent payable according to the articles of association. If there are no profits, it must be paid out of capital, because shareholder becomes the creditor of the company in respect of this amount.

(iv) The amount received in advance of calls is not refundable.

(v) In the event of winding up the shareholder ranks after the creditors, but must be paid his amount with interest, if any before the other shareholders are paid off.

(vi) The power to receive the payment in advance of calls must be exercised in the general interest and for the benefit of the company.
Transfer of shares

Question 20

A company refuses to register transfer of shares made by X to Y. The company does not even send a notice of refusal to X or Y within the prescribed period. Has the aggrieved party any right(s) against the company for such a refusal? Advise.

Answer

The problem as asked in the question is governed by Section 58 of the Companies Act, 2013 dealing with the refusal to register transfer and appeal against refusal.

In the present case the company has committed the wrongful act of not sending the notice of refusal of registering the transfer of shares.

Under section 58 (4) if a public company without sufficient cause refuses to register the transfer of securities within a period of thirty days from the date on which the instrument of transfer is delivered to the company, the transferee may, within a period of sixty days of such refusal or where no intimation has been received from the company, within ninety days of the delivery of the instrument of transfer, appeal to the Tribunal.

Section 58 (5) further provides that the Tribunal, while dealing with an appeal made under sub-section (4), may, after hearing the parties, either dismiss the appeal, or by order—

(a) direct that the transfer or transmission shall be registered by the company and the company shall comply with such order within a period of ten days of the receipt of the order; or

(b) direct rectification of the register and also direct the company to pay damages, if any, sustained by any party aggrieved;.

In the present case Mr X can make an appeal before the tribunal and claim damages.

Question 21

State the differences in restrictions in transfer and effect of refusal to transfer of shares in a public and a private company?

Answer

In simple words the restriction in a transfer of shares means the conditions that must be met before shares can be transferred by a shareholder to another person. Such restrictions are applicable to private companies within the definition of such companies under section 2(68) of the Companies Act, 2013. Restrictions reduce the freedom in transferring shares.

Refusal to transfer of shares on the other hand, means an irregularity in a particular transaction which renders the registration of the transfer of shares impossible until the irregularity is removed.
Refusal to register a transfer of shares is an act of an otherwise permitted transaction whereas a restriction on a transfer is an obstacle to the transaction itself. Therefore, a shareholder may appeal to the Tribunal under section 58 (5) against a refusal to transfer but there is no remedy against a restriction imposed on transfer of shares in the Articles.

It may be mentioned that restrictions on transfer are a distinguishing feature of private companies whereas under section 58 (2) the securities of a public company are freely transferable.

**How nomination facility shall operate in case of transmission of shares?**

**Question 22**

*Examine the provisions of the Companies Act, 2013 regarding ‘nomination’ in case of transmission of shares.*

**Answer**

Under section 56 (2) of the Companies Act, 2013 a company is required to register, on receipt of an intimation of transmission of any right to securities by operation of law from any person to whom such right has been transmitted. This means that a person who has acquired the right to the securities of a member by the operation of any law can further transfer those shares to a third person without being registered as a member himself. This is further reiterated in section 56 (5) whereby the transfer of any security or other interest of a deceased person in a company made by his legal representative shall, even if the legal representative is not a holder thereof, be valid as if he had been the holder at the time of the execution of the instrument of transfer.

Transmission of shares generally happens when a person acquires the shares of a deceased member by virtue of being his legal representative.

Under the Companies Act, 2013 the company must register the shares either in favour of the legal representative as the nominee of the deceased member or in favour of a third person to whom the shares have been transferred by the legal representative.

The Companies Act recognises the ownership of the shares with the legal representative whether registered or not. In case the shares are not registered in the name of the legal representative though his ownership is undisputed, he will not have any voting rights unless the shares are registered in his name.

**Question 23**

*How nomination facility shall operate in case of transmission of shares under the provisions of the Companies Act, 2013?*

**Answer**

In terms of the Companies Act, 2013 when any person who becomes a nominee or legal representative of a member by virtue of the operation of any law, he may, upon the production
of such evidence as may be required by the Board and subject to any other applicable law, either
(a) get himself registered as holder of the securities; or
(b) transfer the securities, in favour of a third person who shall be entitled to get the
securities registered in his name with the company.

If the person being a nominee, so becoming entitled, elects to be registered as holder of the
securities, he shall deliver or send to the company a notice in writing signed by him stating
that he so elects and such notice shall be accompanied with the death certificate of the
deceased member.

Blank Transfer & Forged transfer

Question 24

Explain the following with reference to transfer of shares in a company registered under the
Companies Act, 2013:
(i) Blank Transfers
(ii) Forged Transfers.

Or

“A forged transfer of shares is a nullity.” Comment.

Answer

(i) Blank Transfers: A blank transfer is an instrument of transfer signed by the transferor in
which the name of the transferee and the date of the transfer are not filled. The
ownership of the shares in a company is generally transferred from one person to
another by the execution of a document by the seller and the buyer. This document is
variably described as a “transfer instrument” or “transfer deed” or simply “transfer”. But
in a blank transfer, the seller fills in his name and signs it. Neither the buyers’ name nor
his signature and the date of sale is filled in the transfer. This practice enables the buyer
to sell it again and the subsequent buyer also can sell these shares again by the same
transfer deed. This process can be used for a number of times. For such ultimate transfer
and registration the first seller will be treated as the transferor.

However, under section 56 (1) of the Companies Act, 2013 a company shall not register
a transfer of securities of the company, or the transfer of interest of a member in the
company in the case of a company having no share capital, unless a proper instrument of
transfer, in such form as may be prescribed, duly stamped, dated and executed by or on
behalf of the transferor and the transferee and specifying the name, address and
occupation, if any, of the transferee has been delivered to the company by the transferor
or the transferee within a period of sixty days from the date of execution, along with the
certificate relating to the securities, or if no such certificate is in existence, along with the
letter of allotment of securities.
Therefore, blank transfers are no longer valid and no company will register such transfers.

(ii) **Forged Transfers:** According to Section 46(1) of the Companies Act, 2013, a share certificate once issued under the common seal of the company, specifying the shares held by any person shall be prima facie evidence of the title of the person to such shares. Therefore, in the normal course the person named in the share certificate is for all practical purposes the legal owner of the shares therein and the company cannot deny his title to the shares.

A Forged transfer is a nullity. It does not give the transferee concerned any title to the shares. If the company acts on a forged transfer and removes the name of the real owner from the Register of Members, then it is bound to restore the name of the real owner on the register as the holder of the shares and to pay him dividends which he ought to have received.

**Question 25**

‘A’ commits forgery and thereby obtains a certificate of transfer of shares from a company and transfers the shares to ‘B’ for value acting in good faith. Company refuses to transfer the shares to ‘B’. **Whether the company can refuse? Decide the liability of ‘A’ and of the company towards ‘B’**.

**Answer**

A forged transfer is a nullity in law. It does not give the transferee concerned any title to the shares. Since the forgery is an illegality therefore it cannot be a source of a valid transfer of a title. Although the innocent purchaser acting in good faith could validly and reasonably assume that the person named in the certificate as the owner of the shares was really the owner of the shares represented by the certificate. Even then the illegality cannot be converted into legality. Therefore, in this case company is right to refuse to do the transfer of the shares in the name of the transferee B without any liability.

As regards the liability of A incurs a criminal liability under the Indian Penal Code punishable both by imprisonment and also being liable to compensate both the Company and B for losses suffered by them.

**Question 26**

X, a registered shareholder of Y Limited left his share certificates with his broker. A forged the transfer deed in favour of Z, accompanied by these share certificates lodged the transfer deed alongwith the share certificates with the company for registration. The Company Secretary who had certain doubts, wrote to X informing him of the proposed transfer and in the absence of a reply from him (X) within the stipulated time, registered the transfer of shares in the name of Z. Subsequently, Z sold the shares to J and J's name was placed in the register of shareholders. Later on, X discovered that forgery has taken place.
Referring to the provisions of the Companies Act, 2013, state the remedy available to X in the given case. Explain.

**Answer**

A forgery is a nullity in law and does not give any title to the persons who acquire an asset by forgery even if they have acted in good faith irrespective of the number of transactions done. In the present case, despite all transactions happening, X will be restored as the member by the company.

**Remedies available to X:** Since a forged transfer is a nullity, it does not pass any legal title to the transferee. The true owner can have his name restored on the register of member. A forged document can never have any legal effect.

X can also claim any dividend, which may not have been paid to him during the intervening period. (*Barton V North Staffordshire*)

**Transmission of shares**

**Question 27**

Explain the meaning of “transmission of Shares” under the Companies Act, 2013. In what ways is “transmission of shares” different from “Transfer of Shares”?

**Answer**

**Transmission and transfer of shares:** Under Section 56 of the Companies Act, 2013, transmission of shares takes place when shares are transferred under the operation of law, either on the death of the registered shareholder or on his being adjudged as insolvent. Where the holder is a company and it goes into liquidation the shares held by it are transmitted to its official liquidator. Upon the death of a member, the shares of the deceased vest in his legal representatives and his estate becomes liable for calls if the shares are not fully paid up. In a like manner the official assignee or the receiver, as the case may be, is also entitled to be registered as a member in the place of shareholder who has been adjudged as insolvent [*R. W. Key and Sons (1902) IC, 467*].

However, the executors or administrators as also the legal representative of a deceased member, may decline to be registered as members for various reasons. In that event the legal representatives, or the liquidators in case of the winding up of a corporate shareholder by virtue of Section 56 (5) shall be entitled to transfer the shares directly.

**Distinction between transfer and transmission of shares**

<table>
<thead>
<tr>
<th>Transfer of shares</th>
<th>Transmission of shares</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. It is effected by a voluntary/deliberate act of the parties by way of a contract.</td>
<td>1. It takes place by operation of law e.g. due to death, insolvency or lunacy of a member.</td>
</tr>
<tr>
<td>2. It takes place for consideration.</td>
<td>2. No consideration is involved.</td>
</tr>
</tbody>
</table>

© The Institute of Chartered Accountants of India
3. The transferor has to execute a valid instrument of transfer.

4. As soon as the transfer is complete, the liability of the transferor ceases.

3. There is no prescribed instrument of transfer.

4. Shares continue to be subject to the original liabilities.

**Forfeiture and surrender of shares**

**Question 28**

*What conditions as required under the Companies Act, 2013 must be satisfied by a company for the forfeiture of shares of a member, who has defaulted the payment of calls? What are the consequences of such forfeiture?*

**Answer**

**Forfeiture of Shares and the Consequences**

The Companies Act, 2013 prescribes the rules and procedures of forfeiture of shares to be mentioned in the Articles of Association. Therefore, the forfeiture of shares is governed by the Articles rather than the Act itself. However, Table F of the First Schedule of the Act lays down the draft Articles of a company limited by shares which may be adopted either in full or with some modifications. In accordance with the Act and Table F the conditions and applicable rules for forfeiture of shares are as under-

1. In accordance with the Articles: Forfeiture-must be authorized by the Articles of the company and must be for the benefit of the company.

2. Notice prior to forfeiture: Before shares can be forfeited, the company must serve a notice on the defaulting shareholder requiring payment of unpaid call together with any interest which may have accrued. (Article 28: Table F).

3. Give not less than 14 days time from the date of service of notice for the payment of the amount due (Article 29 of Table F);

4. State that in the event of non-payment of the amount due within the period mentioned in the notice, the shares in respect of which the call was made will be liable to be forfeited, (Article 29. Table F). The notice of forfeiture must also specify the exact amount due from the shareholder. If the notice is defective in any respect, the forfeiture will be invalid.

5. Resolution of the Board: If a defaulting shareholder does not pay the amount within the specified time as required by the notice, the directors must pass a resolution forfeiting the shares (Article 30). If the resolution is not passed, the forfeiture is invalid. If, however, the notice threatening the forfeiture incorporates the resolution of forfeiture as well, e.g., when it states that in the event of default the shares shall be deemed to have been forfeited, no further resolution is necessary.

6. Good faith: The power to forfeit shares must be exercised by the directors in good faith and for the benefit of the company.
Effect of forfeiture:

1. Cessation of membership: A person whose shares have been forfeited ceases to be a member in respect of the shares so forfeited. He, however, remains liable to pay to the company all moneys which, at the date of forfeiture were payable by him to the company in respect of the shares.

2. Cessation of liability: The liability of the person whose shares have been forfeited ceases if and when the company receives payment in full of all such money in respect of the shares.

3. Forfeited shares become the property of the company and may be reissued or otherwise disposed of on such terms and in such manner as the Board thinks fit. The purchaser would be liable to pay all the calls due on the shares including the call for which shares were forfeited. But where the articles provide that a shareholder whose shares have been forfeited is to remain liable for the call occasioning the forfeiture, the purchaser is liable only for the difference between the amount of the call and the sum realized on reissue, should this be less than the call.

Question 29

What are the conditions and procedure where under shares may be forfeited under the Companies Act, 2013?

Answer

Procedure and Conditions for Effecting Forfeiture:

Shares can be forfeited if the following conditions are fulfilled: -

(1) Shares can be forfeited only if authorised by Articles of Association of the Company. Ordinarily forfeiture of shares can take place only for the non-payment of calls due to company and in such cases, calls must have been validly made. But articles may provide other grounds for forfeiture. *(Naresh Chandra Sanyal V. Calcutta Stock Exchange Association Ltd.)*

(2) Forfeiture is in the nature of penal proceedings. It is valid if only if the provisions of the Articles are strictly complied with.

(3) The power of forfeiture must be exercised bonafide, in the interests of the company.

Procedure: The procedure to be followed is laid down in Table F of Schedule I to the Companies Act, 2013. Articles of a company, usually, contain similar provisions. The procedure to be followed is narrated below.

(1) The company must serve a notice on the defaulting shareholder requiring payment of the unpaid call together with any interest which may have accrued (Articles 28 of Table F).

(2) The notice must -
(a) give not less than 14 days time from the date of service of notice for the payment of the amount due.

(b) state that in the event of non-payment of the amount due within the period mentioned in the notice, the shares in respect of which the call was made will be liable to be forfeited (Article 30 of Table A).

The notice of forfeiture must also specify the exact amount due from the shareholder. If the notice is defective in any respect e.g. where it does not specify the amount claimed by the company, or where it claims a wrong amount, the forfeiture will be invalid.

(3) If the defaulting shareholder does not make the payment of amount within the specified time as required by the notice, the directors must pass a resolution forfeiting the shares (Article 30 of Table F).

**Debentures**

**Question 30**

*Explain the meaning and significance of the ‘Pari Passu’ clause in a debenture. State the particulars to be filed with the Registrar of Companies in case of such debentures secured by a charge on certain assets of the company.*

**Answer**

‘**Pari Passu**’: *Pari Passu* clause in a debenture means that all the debentures of that particular series are to be paid rateably, if, therefore, security is insufficient to satisfy the whole debts secured by the series of debentures, the amounts of debentures will abate proportionately. If this clause is not included, the debentures will rank in priority for payment in accordance with the date of issue, and if they are all issued on the same date they will be payable according to their numerical order. A company, however, cannot issue a new series of debentures so as to rank *‘pari passu’* with any prior series unless the power to do so is expressly reserved and contained in the document of offer.

**Registration of charge:** Under section 77 (1) of the Companies Act, 2013, it shall be the duty of every company creating a charge within or outside India, on its property or assets or any of its undertakings, whether tangible or otherwise, and situated in or outside India, to register the particulars of the charge signed by the company and the charge-holder together with the instruments, if any, creating such charge in such form, on payment of such fees and in such manner as may be prescribed, with the Registrar within thirty days of its creation.

In terms of Rule 3 of the Companies (Registration of Charges), Rules 2014 for the registration of charge in respect of debentures the following documents should be submitted to the Registrar:

a. The particulars of charge;

b. Instrument for the creation or the modification of the charge;
c. Application in prescribed Form

**Question 31**
State the types of debentures which may be issued by a public company.

**Answer**

**Types of debentures:**

Different types of debentures may be enumerated as follows:

(i) *Unsecured debentures:* Such debentures do not carry any charge on the assets of the company. The holders of these debentures do not have any security as to repayment of principal or interest thereon.

(ii) *Secured debentures:* Such debentures are secured by a mortgage of the whole or part of the assets of the company and known as mortgaged or secured debentures. Such debentures may be of one or more of the following types:

a. Redeemable: These debentures are redeemable on the expiry of the term for which they have been issued. Secured debentures shall be redeemable within a period of 10 years from the date of issue and in case of infrastructure projects, within a maximum period of 30 years.

b. Partly convertible: These debentures are convertible into equity shares of the company for part of their face values and the balance face value is redeemed;

c. Fully convertible: These debentures are not redeemable in cash but are converted into equity shares after the prescribed period as per the terms of issue.

**Question 32**

*What are the provisions of the Companies Act, 2013 relating to the appointment of ‘Debenture Trustee’ by a company? Whether the following can be appointed as ‘Debenture Trustee’:* 

(i) A shareholder who has no beneficial interest.

(ii) A creditor whom the company owes ₹499 only.

(iii) A person who has given a guarantee for repayment of amount of debentures issued by the company.

**Answer**

**Appointment of Debenture Trustee:** Under section 71 (5) of the Companies Act, 2013, no company shall issue a prospectus or make an offer or invitation to the public or to its members exceeding five hundred for the subscription of its debentures, unless the company has, before such issue or offer, appointed one or more debenture trustees and the conditions governing the appointment of such trustees shall be such as may be prescribed.

The rules framed under the Companies Act for the issue of secured debentures provide that before the appointment of debenture trustee or trustees, a written consent shall be obtained...
from such debenture trustee or trustees proposed to be appointed and a statement to that
effect shall appear in the letter of offer issued for inviting the subscription of the debentures.

Further according to the rules, no person shall be appointed as a debenture trustee, if he-

(i) Beneficially holds shares in the company;
(ii) Is a promoter, director or key managerial personnel or any other officer or an employee
of the company or its holding, subsidiary or associate company;
(iii) Is beneficially entitled to moneys which are to be paid by the company otherwise than
as remuneration payable to the debenture trustee;
(iv) Is indebted to the company, or its subsidiary or its holding or associate company or a
subsidiary of such holding company;
(v) Has furnished any guarantee in respect of the principal debts secured by the debentures
or interest thereon;
(vi) Has any pecuniary relationship with the company amounting to two per cent. or more of
its gross turnover or total income or fifty lakh rupees or such higher amount as may be
prescribed, whichever is lower, during the two immediately preceding financial years or
during the current financial year;
(vii) is a relative of any promoter or any person who is in the employment of the company as a
director or key managerial personnel;

Thus based on the above provisions answers to the given questions are:

(i) A shareholder who has no beneficial interest can be appointed as a debenture trustee.
(ii) A creditor whom company owes ₹499 cannot be so appointed. The amount owed is
immaterial.
(iii) A person who has given guarantee for repayment of principal and interest thereon in
respect of debentures also cannot be appointed as a debenture trustee.

Question 33

Explain briefly the distinction between shares and debentures and state whether a company
can issue debentures with voting rights.

Answer

The distinction between a share and a debenture is as under:

(i) Shares are a part of the capital of a company whereas debentures constitute a loan.
(ii) The shareholders are the owners of the company whereas debenture holders are
creditors.
(iii) Shareholders generally enjoy voting right whereas debenture holders do not have any
voting right.
(iv) Interest on debentures is payable even if there are no profits. Dividend can be paid to shareholders only out of the profits of the company.

(v) Debentures have generally a charge on the assets of the company but shares do not carry any such charge.

(vi) The rate of interest is fixed in the case of debentures whereas on equity shares the dividend may vary from year to year.

(vii) Debentures get priority over shares in the matter of repayment in the event of liquidation of the company.

**Issue of Debentures with voting rights:** Under section 71 (2) of the companies Act, 2013 no company can issue any debentures carrying voting rights.

**Registration of charge**

**Question 34**

*Is registration of a charge compulsory? If not, what are the effects of non-registration?*

**Answer**

Section 77 (1) clearly provides that it shall be the duty of every company creating a charge within or outside India, on its property or assets or any of its undertakings, whether tangible or otherwise, and situated in or outside India, to register the particulars of the charge signed by the company and the charge-holder together with the instruments, if any, creating such charge in such form, on payment of such fees and in such manner as may be prescribed, with the Registrar within thirty days of its creation or such extended period as has been approved by the Registrar.

Under section 78 where a company fails to register the charge within the period specified in section 77, without prejudice to its liability in respect of any offence under this Chapter, the person in whose favour the charge is created may apply to the Registrar for registration of the charge along with the instrument created for the charge, within such time and in such form and manner as may be prescribed and the Registrar may, on such application, within a period of fourteen days after giving notice to the company, unless the company itself registers the charge or shows sufficient cause why such charge should not be registered, allow such registration on payment of such fees, as may be prescribed.

Provided that where registration is effected on application of the person in whose favour the charge is created, that person shall be entitled to recover from the company the amount of any fees or additional fees paid by him to the Registrar for the purpose of registration of charge.

**Question 35**

*ABC Limited realised on 2nd May, 2010 that particulars of charge created on 12th March, 2010 in favour of a Bank were not filed with the Register of Companies for Registration, what procedure should the Company follow to get the charge registered with the Registrar of Com-*
panies? Would the procedure be different if the charge was created on 12th February, 2010 instead of 12th March, 2010? Explain with reference to the relevant provisions of the Companies Act, 2013.

Answer

The prescribed particulars of the charge together with the instrument, if any by which the charge is created or evidenced, or a copy thereof shall be filed with the Registrar within 30 days after the date of the creation of charge. [Section 77 (1)]. In this case particulars of charge have not been filed within the prescribed period of 30 days.

However, the Registrar is empowered under proviso to section 77 (1) to extend the period of 30 days by another 300 days on payment of such additional fee as may be prescribed. Taking advantage of this provision, ABC Ltd., should immediately file the particulars of charge with the Registrar and satisfy the Registrar that it had sufficient cause, for not filing the particulars of charge within 30 days of creation of charge.

There will be no change in the situation if the charge was created on 12th February, 2010.

Question 36

A charge requiring registration with Registrar of Companies was created on 1st February, 2008 by XYZ Limited. The Secretary of the Company realised on 15th March, 2008 that the charge was not filed with the Registrar. State the steps to be taken by the Secretary to get the charge registered with the Registrar.

Answer

Registration of Charge: Steps for belated registration (Section 77 of the Companies Act, 2013): A charge should be registered within 30 days after the date of its creation. In this case the charge was created on 1st Feb, 2008. Hence the particulars of charge are required to be filed with the Registrar on or before 2nd March, 2008 [Section 77 (1)].

The Secretary of the company realised only on 15th March, 2008 that the charge was not filed with the Registrar. It is, however, open to the Registrar to extend the time for filing of the charge within 300 days if the company satisfies the Registrar that it had sufficient cause for not filing the particulars within 30 days. [Proviso to Section 77(1)]. The Secretary may take advantage of this provision and immediately file the particulars of charge with the Registrar giving adequate reasons for the delay. If the Registrar is satisfied, he may allow registration on payment of additional fee.

Question 37

What is the concept of “charge” under the provisions of the Companies Act, 2013? Point out the circumstances where under a floating charge becomes a fixed charge.
Answer

The word "Charge" defined under section2(16), has not been adequately defined in the Companies Act, 2013. so, the meaning of the term should be drawn from its use in normal parlance. A charge means a lien or a claim on an asset against a loan taken, providing that the owner cannot dispose off the asset without clearing off the loan. It also provides that in case the borrower defaults on the loan, the lender may dispose of the asset and use the proceeds to adjust his claim on the loan and pay the excess amount received to the borrower. Since, physical possession of the asset as a security is not possible in respect of all assets, those assets which cannot be physically taken over the by lender as securities, are charged in favour of the lender by executing a loan and a charge document.

Section 77 (1) clearly provides that it shall be the duty of every company creating a charge within or outside India, on its property or assets or any of its undertakings, whether tangible or otherwise, and situated in or outside India, to register the particulars of the charge signed by the company and the charge-holder together with the instruments, if any, creating such charge in such form, on payment of such fees and in such manner as may be prescribed, with the Registrar within thirty days of its creation or such extended period as has been approved by the Registrar.

Crystallisation of a Floating Charge

Floating charge crystallizes under the following circumstances:

1. When the company goes into liquidation, or
2. When the company ceases to carry on business, or
3. When a receiver is appointed, or
4. When default is made in paying the principal and/or interest and the holder of the charge brings an action to enforce his security.

Question 38

Define the term "charge" and also explain what is the punishment for default with respect to registration of charge as per the provisions of the Companies Act, 2013.

Answer

Charge- When parties agree that property shall be made available as security for the payment of debt in a transaction for value, this is termed as that charge is created.

The term charge has been defined in section 2 (16) of the Companies Act, 2013 as an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage.

Every company is under an obligation to keep at its registered office a register of charges and enter therein all charges specifically affecting property of the company and all floating charges on the undertaking or any property of the company.
Punishment for contravention – According to section 86 of the Companies Act, 2013, if a company makes any default with respect to the registration of charges covered under chapter VI, a penalty shall be levied, ranging from ₹1 lakh to 10 lakhs.

Every defaulting officer is punishable with imprisonment for a term not exceeding 6 months or fine which shall not be less than 25,000 rupees, but not exceeding 1 lakh rupees or both.

Question 39

Distinguish between “fixed Charge” and “Floating charge”.

Answer

Distinction between fixed charge and floating charge:

<table>
<thead>
<tr>
<th>Fixed charge</th>
<th>Floating charge</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. It is a legal charge.</td>
<td>1. It is an equitable charge.</td>
</tr>
<tr>
<td>2. It is a charge on specific, ascertained and existing asset.</td>
<td>2. It is a charge on present and future assets. No specific assets.</td>
</tr>
<tr>
<td>3. Company cannot deal with the assets except with the consent of the charge holder.</td>
<td>3. Company is free to use or deal with the assets the way it likes until the charge becomes fixed.</td>
</tr>
<tr>
<td>4. Registration of fixed charge on movable assets is not compulsory.</td>
<td>4. Registration of all floating charge on all kinds of assets is compulsory by law.</td>
</tr>
<tr>
<td>5. Fixed charge has always priority over floating charge.</td>
<td>5. Ambulatory and shifting in character.</td>
</tr>
</tbody>
</table>

Question 40

What is meant by a floating charge? State the characteristics of a floating charge. When does a floating charge crystallise?

Answer

Floating charge: A floating charge is an equitable charge which is not a specific charge on any property of the company. Thus, the company may, despite the charge, deal with any of the assets in the ordinary course of business. It is of the essence of a floating charge that it remains dormant until the undertaking charged ceases to be a going concern or until the person in whose favour the charge is created, intervenes.

The main characteristics of a floating charge as described in Re. Yorkshire wool combers Association are as follows:

(i) It is a charge on a class of the company’s assets, present and future, that class being one which, in the ordinary course of the business is changing from time to time.
Generally, it is contemplated that the company carry on its business in an ordinary way with such a class of assets till some event occurs on which the charge is to settle down on the property as then existing and the charge becomes fixed. The moment the charge crystallises, it becomes a fixed charge.

A floating charge crystallises or gets fixed when:
(i) The company goes into liquidation or
(ii) The company ceases to carry on business
(iii) A receiver is appointed or
(iv) A default is made in paying the principal and/or interest and the holder of the charge brings an action to enforce his security.

**Question 41**

*Explain briefly the provisions relating to registration, modification and satisfaction of charges.*

**Answer**

**Registration of charges:**

Under section 77 (1) of the Companies Act, 2013 it shall be the duty of every company creating a charge:

- a. within or outside India,
- b. on its property or assets or any of its undertakings,
- c. whether tangible or otherwise, and
- d. situated in or outside India,

to register the particulars of the charge signed by the company and the charge-holder together with the instruments, if any, creating such charge in such form, on payment of such fees and in such manner as may be prescribed, with the Registrar within thirty days of its creation.

Provided that the Registrar may, on an application made by the company, allow such registration to be made within a period of three hundred days of such creation on payment of such additional fees as may be prescribed.

Provided further that if registration is not made within a period of three hundred days of such creation, the company shall seek extension of time in accordance with section 87 which empowers the Central Government to grant extension of time for filing of charges on an application made to it and under specified circumstances.

Provided also that any subsequent registration of a charge shall not prejudice any right acquired in respect of any property before the charge is actually registered.

Section 77 (2) provides that where a charge is registered with the Registrar under sub-section (1) (as explained above), he shall issue a certificate of registration of such charge in such form.
and in such manner as may be prescribed to the company and, as the case may be, to the
person in whose favour the charge is created.

Section 77 (4) further provides that nothing shall prejudice any contract or obligation for the
repayment of the money secured by a charge. This means that the obligation of a company to
repay the debt is not affected by the non registration of the charge.

Section 78 further provides that if the company fails to register the charge, the same can be
done by the person in whose favour the charge is created by following the prescribed
conditions.

**Modification of charge:** The term 'modification' includes variation of any of the terms of the
agreement including variation of rate of interest which may be by mutual agreement or by
operation of law. Even if the rights of a charge holder are assigned to a third party, it will be
regarded as a modification.

Section 79 of the Companies Act, 2013 provides that “whenever the terms or conditions or the
extent or operation of any charge registered under section 77 of the Act are modified, it shall
be the duty of the company to send to the Registrar the particulars of such modifications and
get such modification registered. The provisions applicable to the registration of a charge
under section 77 shall apply to modification of the charge.”

Some examples of modification are as under:
1. where the charge is modified by varying any terms and conditions of the existing charge
   by agreement;
2. where the modification is in pursuance of an agreement for enhancing or decreasing the
   limits;
3. where the modification is by ceding a pari passu charge;
4. change in rate of interest (other than bank rate);
5. change in repayment schedule of loan; (this is not applicable in working loans which are
   repayable on demand) and
6. partial release of the charge on a particular asset or property.

**Satisfaction of charge:** The term satisfaction of charge means that the company has either
paid off the debt against which the charge was created or the assets charged have been
disposed off and the debt paid off. In either case, the full payment of the debt results in the
satisfaction of charge and when this happens the charge must be got vacated.

Under section 82 (1) a company shall give intimation to the Registrar in the prescribed form, of
the payment or satisfaction in full of any charge registered under this Chapter within a period
of thirty days from the date of such payment or satisfaction.

Section 82 (2) provides that the Registrar shall, on receipt of intimation under sub-section (1),
send a notice to the holder of the charge calling upon him to show cause within such time not
exceeding fourteen days, as may be specified in such notice, as to why payment or
satisfaction in full should not be recorded as intimated to the Registrar. If no cause is shown, by such holder of the charge, the Registrar shall order that a memorandum of satisfaction shall be entered in the register of charges and shall inform the company that he has done so:

Section 83 (1) states that the Registrar may, on evidence being given to his satisfaction with respect to any registered charge

(a) that the debt for which the charge was given has been paid or satisfied in whole or in part; or

(b) that the part of the property or undertaking charged has been released from the charge or has ceased to form part of the company’s property or undertaking,

enter in the register of charges a memorandum of satisfaction in whole or in part, or of the fact that part of the property or undertaking has been released from the charge or has ceased to form part of the company’s property or undertaking, as the case may be

Section 82 (2) further requires the Registrar to inform the affected parties within thirty days of making the entry in the register of charges kept under sub-section (1) of section 81.

Part payment or satisfaction of charge need not be intimated to the Registrar; only satisfaction in full has to be reported within 30 days from the date of such payment of satisfaction.

Question 42

Define the term “charge” and also explain what is the punishment for default with respect to registration of charge as per the provisions of the Companies Act, 2013.

Answer

Charge- When parties agree that property shall be made available as security for the payment of debt in a transaction for value, this is termed as that charge is created.

The term charge has been defined in section 2 (16) of the Companies Act, 2013 as an interest or lien created on the property or assets of a company or any of its undertakings or both as security and includes a mortgage.

Every company is under an obligation to keep at its registered office a register of charges and enter therein all charges specifically affecting property of the company and all floating charges on the undertaking or any property of the company.

Punishment for contravention – According to section 86 of the Companies Act, 2013, if a company makes any default with respect to the registration of charges covered under chapter VI, a penalty shall be levied, ranging from ₹1 lakh to 10 lakhs.

Every defaulting officer is punishable with imprisonment for a term not exceeding 6 months or fine which shall not be less than 25,000 rupees, but not exceeding 1 lakh rupees or both.
Exercise

1. **XYZ Limited realised on 3rd May, 2010 that particulars of charge created on 11th July, 2010 in favour of a bank were not filed with the Registrar of Companies for registration.** What procedure should the company follow to get the charge registered with the Registrar of Companies? **Would the procedure be different if the charge was created on 11th June, 2010 instead of 11th July, 2010?** Explain with reference to the relevant provisions of the Companies Act, 2013.

[Hints: As per the provisions given under Section 77 of the Companies Act, 2013]

2. **X had applied for the allotment of 1,000 shares in a company. No allotment of shares was made to him by the company. Later on, without any further application from X, the company transferred 1,000 partly-paid shares to him and placed his name in the Register of Members. X, knowing that his name was placed in the Register of Members, took no steps to get his name removed from the Register of members. The company later on made final call. X refuses to pay for this call. Referring to the provisions of the Companies Act, 2013, examine whether his (X's) refusal to pay for the call is tenable and whether he can escape himself from the liability as a member of the company.**

[Hints: **Section 88 and 89 of the Companies Act, 2013**]

3. **State whether the following statements are correct or incorrect. Give reasons:**
   
   (i) **Right shares means shares which are issued by a newly formed company.**
   
   (ii) **A bearer of a share warrant of a company is not member of the company.**
   
   (iii) **Debenture with voting rights can be issued only if permitted by the Articles of Association.**

[Hints: (i) incorrect, as per Section 62 of the Companies Act, 2013 (ii) Correct, Please read RBI Circular on Share Warrants July 2014 (iii) incorrect, as per Section 71 (2) of the Companies Act, 2013]

4. **X purchased 100 equity shares of ABC Ltd. from Y. Though the amount of transaction was paid to the seller, the transferee name is not appearing in the list of members. Subsequently, the company declared dividend. Referring to the provisions of the Companies Act, 1956 state to whom the company will be paying the dividend.**

[Hints: According to section 123 (5) of the Companies Act, 2013 dividend shall be paid only to the registered holder of shares or to his order or to his bankers or to the bearer of a share warrant.]

5. **T, a share broker at Bombay Stock Exchange, is also the Secretary of XYZ Ltd. He applied for the allotment of 1000 equity shares being issued by the Company and paid the full amount. M, one of the clerks of T, owning no shares executed a transfer deed in favour of T without enclosing the share certificate. The Company without asking for the share certificate from M (the clerk) registered the transfer and issued a new share certificate. On declaration of dividend by the Company T was denied the right to get dividend on the grounds that the share certificate issued to T had no validity. T moves the Court praying the Court to declare the share certificate as valid and also claims for damages.**
Examine the case and decide whether T's claim is valid.

[Hints: T's claim is invalid, read section 123 (5). Also read 56 (1). It is impossible to get the shares registered in favor of M without the documents specified in section 56 (1). It shows fraud on the part of M and gross negligence on the part of T. Read section 56 (6) and 57 also]

6. State whether the given statements are true or false with reasons-

(i) Deferred shares also called founders' shares.

(ii) To authorise the issue of shares at a discount, a special resolution is required.

[Hints: (i) True. Since deferred shares are often held by the promoters of the company, they are called so.

(ii) False, as per Section 54 of the Companies Act, 2013]
UNIT – 4: MEETINGS AND PROCEEDINGS

Classification of Meetings

Question 1
What are the different types of meetings, under Companies Act, 2013.

Answer

Types of Meetings under Companies Act, 1956:
1. Meetings of shareholders or members:
   (a) Annual general meeting.
   (b) Extraordinary general meeting.
   (c) Class meetings.
2. Meeting of debenture holders.
3. Meetings of creditors and contributories in winding up.
4. Meeting of creditors otherwise than in winding up.
5. Meeting of directors:
   (a) Board meeting.
   (b) Committee meeting.

Meeting of Shareholders

Annual General Meeting

Question 2
In what way does the Companies Act, 2013 regulate the holding of an Annual General Meeting by a company? Explain.

Answer

Provisions relating to regulation of AGM under the Companies Act, 2013:

Section 96 of the Companies Act, 2013 regulates the holding of an Annual General Meeting by a company. Accordingly, section provided that:

1. Every company, other than a one person company, shall in each year hold in addition to any other meetings, an annual general meeting and shall specify the meeting as such in the notices calling it; and not more than 15 months shall elapse between the date of one annual AGM of a company and that of the next.

A company may hold its first AGM within a period of nine months from the date of closing of its first financial year and in every other case within a period of six months from the date of closing of the financial year;
Further, if a company holds its first annual general meeting as aforesaid, it shall not be necessary for the company to hold any AGM in the year of its incorporation.

However, the Registrar may, for any special reason, extend the time within which any AGM (not being the first AGM) shall be held, by a period not exceeding 3 months.[Section 96(1)]

2. Every AGM shall be called during business hours, i.e. between 9 am and 6 pm on any day that is not a National holiday, and shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situated.

The Central Government may however, exempt any company from the provisions of this sub-section subject to such conditions as it may impose.[Section 96(2)]

Further, section 167 of the Companies Act, 1956 (Corresponding section 97 of the Companies Act, 2013 not notified till 31st March, 2015, so not applicable for November 2015 examinations) provides for the power of the Company Law Board to call annual general meeting under certain circumstances:

(1) If default is made in holding an AGM in accordance with Section 166 of the Companies Act, 1956 (i.e., section 96 of the Companies Act, 2013), the CLB may, notwithstanding anything in the Act or in the articles of the company, on the application of any member of the company, call, or direct the calling of, a general meeting of the company and give such ancillary or consequential directions as the CLB thinks expedient in relation to the calling, holding and conducting of the meeting.

(2) A general meeting held in pursuance of sub-section (1) shall, subject to any directions of the CLB, be deemed to be an AGM of the company.

Further Section 168 of the Companies Act, 1956 (Corresponding Section 99 of the Companies Act, 2013 not notified till 31st March, 2015, so not applicable for November 2015 examinations) provides that if default is made in holding a meeting of the company in accordance with Section 166 of the Companies Act, 1956 (i.e., section 96 of the Companies Act, 2013), or in complying with any directions of the CLB under sub-section (1) of Section 167, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to ₹50,000 and in the case of a continuing default, with a further fine which may extend to ₹2,500 for every day after the first during which such default continues.

[Note: Section 167 and 168 of the Companies Act, 1956 is still in force as their corresponding sections 97 & 99 of the Companies Act, 2013 are not notified till 31st March, 2015]

Question 3

Explain the provisions of the Companies Act, 2013 relating to holding of Annual General Meeting of the Company with regard to the following:

(i) Period within which the first and the subsequent Annual General Meetings must be held.
(ii) Business which may be transacted at an Annual General Meeting.

Answer

(i) Period Within which first and the subsequent AGM must be held:

(a) Under the first proviso to section 96 (1) of the Companies Act, 2013

1. A company may hold its first AGM within a period of nine months from the date of closing of its first financial year;

2. Every subsequent annual general meeting must be held within a period of six months from the date of closing of the financial year.

3. However, the third proviso to section 96 (1) empowers the Registrar, for any special reason, to extend the time within which any AGM (other than the first AGM) shall be held, by a period not exceeding 3 months. Hence, the Registrar is not empowered by the Act to extend the time for holding the first annual general meeting of a company even under special circumstances.

(b) Further Section 168 of the Companies Act, 1956 provides that if default is made in holding a meeting of the company in accordance with Section 166 (i.e., section 96 of the Companies Act, 2013), or in complying with any directions of the CLB under sub-section (1) of Section 167, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to ₹50,000 and in the case of a continuing default, with a further fine which may extent to ₹2,500 for every day after the first during which such default continues.

[Note: Sections 168 & 167 of the Companies Act, 1956 is still in existance as the corresponding Sections 97 & 99 of the Companies Act, 2013 not notified till 31st March, 2015, so not applicable for November 2015 examinations]

(ii) Business to be transacted at an Annual General Meeting: Under section 102 (2) of the Companies Act, 2013 the following businesses may be transacted at an annual general meeting:

1. Ordinary Business; Viz.

   a) The consideration of the financial statements and the report of the Board of Directors and the Auditors;

   b) The declaration of any dividend;

   c) The appointment of directors in place of those retiring; and

   d) The appointment of and the fixing of the remuneration of the auditors.

2. Special Business: Any business other than the above mentioned four shall be deemed to be a special business, which may be transacted at any AGM.
Question 4

M/s Low Esteem Infotech Ltd. was incorporated on 1.4.2003. No General Meeting of the company has been held so far. Explain the provisions of the Companies Act, 2013 regarding the time limit for holding the first annual general meeting of the Company and the power of the Registrar to grant extension of time for the First Annual General Meeting.

Answer

According to Section 96 of the Companies Act, 2013, every company shall be required to hold its first annual general meeting within a period of 9 months from the closing of its first financial year.

Presuming that the first financial year of Low Esteem Infotech Ltd is for the period 1st April 2003 to 31st March 2004, the first annual general meeting of the company should be held on or before 31st December, 2004.

Even though the Registrar of Companies is empowered to grant extension of time for a period not exceeding 3 months for holding the annual general meetings, such power does not apply in the case of the first annual general meeting. Thus, the company and its directors will be liable under section 168 of the Companies Act, 1956 for the default if the annual general meeting was held after 31st December, 2004.

[Note: Section 168 of the Companies Act, 1956 corresponds to section 99 of the Companies Act, 2013. This section 99 is not notified till 31st March, 2015, so not applicable for November 2015 examinations]

Question 5

Can an annual general meeting be held on a national holiday?

Answer

An annual general meeting cannot be held on a national holiday. Under section 96 (2) of the Companies Act, 2013 every annual general meeting shall be called during business hours, that is, between 9 a.m. and 6 p.m. on any day that is not a National Holiday. A national holiday has been defined in the explanation to section 96 as a day declared as National Holiday by the Central Government.

A day may be declared to be a national holiday after the notices calling the meeting for the day have already been issued. To avoid the difficulties that may be caused from such a situation, no day declared by the Central Government to be a national holiday shall be deemed to be such a holiday in relation to any meeting, unless the declaration was notified before the issue of the notice convening such meeting.

Question 6

State with reason whether the following statement is correct or incorrect:

A company should file its annual return within six months of the closing of the financial year.
The statement is incorrect in terms of section 92 (4) of the Companies Act, 2013.

Section 92 (4) states that every company shall file with the Registrar a copy of the annual return, within sixty days from the date on which the annual general meeting is held or where no annual general meeting is held in any year within sixty days from the date on which the annual general meeting should have been held together with the statement specifying the reasons for not holding the annual general meeting, with such fees or additional fees as may be prescribed.

Extra ordinary General Meeting

Question 7

State the provisions of the Companies Act, 2013 regarding the calling and holding of an extraordinary general meeting with respect to:

(i) Number of members entitled to requisition a meeting.

(ii) Power of the CLB to call meetings of members to be called under Section 186 of the Companies Act, 1956.

Answer

According to the Companies Act, 2013 any meeting of members, other than an Annual General Meeting, shall be deemed to be an extraordinary meeting of the members.

(i) Under section 100 (1) the Board is required to call a general meeting of the members if a requisition is made by the required number of members, which is as under:

(a) in the case of a company having a share capital, such number of members who hold at the date of requisition, not less than 1/10th of such of the paid up capital of the company as on that date carries the right of voting;

(b) in the case of a company not having a share capital, such number of members who have at the date of deposit of requisition not less than 1/10th of the total voting power of all the members having on the said date a right to vote

(ii) Power of Tribunal to order meeting to be called under Section 186:

If for any reason it is impractical to call a meeting, other than an annual general meeting, in any manner in which meetings of the company may be called, or hold or conduct the meeting of the company in the manner prescribed by the Act or the articles, the Tribunal may, either on its own motion or on the requisition of:

(a) Any director of the company or any member of the company who would be entitled to vote at the meeting;

(b) Order a meeting of the company to be called, held and conducted in such manner as the Tribunal thinks fit; and
(c) Give such ancillary or consequential directions as the Tribunal thinks expedient, including directions modifying, or supplementing in relation to the calling holding and conducting of the meeting, the operations of the provisions of the Companies Act, 1956 and of the company’s articles.

The Company Law Board may give direction that one member present in person or by proxy shall be deemed to constitute a meeting with such order shall, for all purposes, be deemed to be a meeting of the company duly called, held and conducted.

Question 8

To remove the Managing Director, 40% members of Global Ltd. submitted requisition for holding extra-ordinary general meeting. The company failed to call the said meeting and hence the requisitionists held the meeting. Since the Managing Director did not allow the holding of meeting at the registered office of the Company, the said meeting was held at some other place and a resolution for removal of the Managing Director was passed.

Examine the validity of the said meeting and resolution passed therein in the light of the companies Act, 2013.

Answer

Section 100 (2) of the Companies Act, 2013 makes it obligatory on the Board of Directors to convene an extra ordinary meeting of members if requisitioned by the stipulated number of members. 40% of members constitute the required number and the board of directors have violated the provisions of law by not calling the meeting.

However, section 100 (4) of the Companies Act, 2013 provides that if directors fail to proceed to call a meeting within 21 days from the date of receipt of a valid requisition for a date within 45 days of the receipt of the requisition, the requisitionists may themselves call a meeting within 3 months of the date of the requisition.

Moreover, where a meeting is called by the requisitionists and the registered office is not made available to them, it was decided in R. Chettiar v. M. Chettiar that the meeting may be held any where else.

Further, resolutions properly passed at such a meeting, are binding on the company.

Thus, in the given case, since all the above mentioned provisions are duly complied with. Hence the meeting with the resolution removing the managing director shall be valid.

Question 9

Examine the validity of the following with reference to the relevant provisions of the Companies Act, 2013:

(i) The Board of Directors of a company refuse to convene the extraordinary general meeting of the members on the ground that the requisitionists have not given reasons for the resolution proposed to be passed at the meeting.
(ii) The Board of Directors refuse to convene the extraordinary general meeting on the ground that the requisitions have not been signed by the joint holder of the shares.

(iii) Adjournment of extraordinary general meeting called upon the requisition of members on the ground that the quorum was not present at the meeting.

Answer

As per Section 100 (2) of the Companies Act 2013, the Board of directors must convene a general meeting upon requisition by the stipulated minimum number of members. Further section 100 (3) the requisition, made under sub-section (2) for convening an extra ordinary general meeting of members, shall set out the matters for the consideration of which the meeting is to be called and shall be signed by the requisitionists and sent to the registered office of the company. The requisitioning members are not required to give reasons for the resolutions proposed so long as the matters are to be dealt with at the meeting are disclosed and the statement in terms of section 102 (1), setting out all material facts relating to each item of business to be transacted is attached to the requisition. This is essential as each such business transacted will be a special business and will require such statement to be sent along with the notice for the meeting.

Based on the above provisions of the Companies Act, 2013 the validity of the cases presented in the question would be as under:

(i) In view of the above law, the board of directors cannot refuse to convene the meeting if the reasons for the resolution are not given. What is required to be stated is the objects of the meeting, i.e., the matters for the consideration of which the meeting and resolutions to be passed. It is also reasonable to assume that the statement of all material facts on the proposed resolution should also be given by the requisitionists as the Board may not be able to prepare such statement as it is not proposing the resolution in the first place. The material information regarding the resolution basically means the justification for the resolution which need not be given.

In given problem (i) the Board of Directors cannot refuse to convene the meeting because reasons for the resolution is not given.

(ii) Where two or more persons hold any shares or interest in a company jointly, a requisition, or notice calling a meeting, signed by one or some of them shall, for the purposes of this section, have the same force and effect as if it had been signed by all of them. On the basis of above section the Board of Directors has no right to refuse to convene the meeting in the given problem (ii).

(iii) As per Section 103 (2) (b) of the Companies Act, 2013, if the quorum is not present within half an hour from the appointed time for holding a meeting of the company, the meeting, if called on the requisition of members, shall stand cancelled. Therefore, the meeting stands cancelled and the stand taken by the Board of Directors to adjourn it is proper in the given problem (iii).
Class Meeting

Question 10

What is a class meeting?

Answer

Class meetings: Meetings of members of a company fall into two broad divisions, namely, general meetings and class meetings. Class meetings are meeting of shareholders, holding a particular class of share which are held to pass resolution which will bind only the members of the class concerned. Only members of the class concerned may attend and vote at meeting. Usually the rules to voting apply to class meetings as they govern voting at general meetings. These class meetings must be convened whenever it is necessary to alter or change the rights or privileges of that class as provided by the articles. For effecting such changes, it is necessary that these are approved at a separate meeting of the holders of those shares and supported by a special resolution. Class meeting of the holders of different classes of shares shall be held if the rights attaching to these shares are to be varied.

Procedure for convening and conduct of General Meetings

Question 11

What are the requirements for the conduct of valid general meetings?

Answer

The business at a meeting of members of a company is said to have been “validly transacted” if the members, whether present personally or through proxies, have voted on the resolutions with the required majority. Once the resolutions have been validly passed all members are bound by them. However, they cannot be so bound unless the meeting is validly held.

The essentials of a valid meeting are that the meeting should be:

(a) Properly convened; i.e. a proper notice must be sent by the proper authority to every person entitled to attend.

(b) Properly constituted, i.e. the proper person must be in the chair, the rules as to quorum must be observed, and the regulations governing the meeting must be complied with.

(c) Properly conducted, i.e. the chairman must conduct the proceeding in accordance with the law relating to general meetings under the various provisions of the Companies Act 2013.

Notice of Meeting

Question 12

Dinesh, a director in a company, gave in writing to the company that notice for any General Meeting and the Board of Directors’ Meeting be sent to him at his address in India only by Registered Mail and for which he paid sufficient money. The company sent two notices to him,
of such meetings, by ordinary mail, under certificate of posting. Dinesh did not receive the said
notices and could not attend the meetings and the proceedings thereof on the ground of
improper notice. Decide in the light of the provisions of the Companies Act, 2013:

(i) Whether the contention of Dinesh is valid?
(ii) Would you answer be still the same in case Dinesh remained outside India for two
months (when such notices were given and meetings held).

Answer

The problem as asked in the question is based on the provisions of the Companies Act, 2013
as contained in Section 101. Accordingly, the notice may be served personally or sent through
post to the registered address of the members and, in the absence of any registered office in
India, to the address, if there be any within India furnished by him to the company for the
purpose of servicing notice to him. Service through post shall be deemed to have effected by
correctly addressing, preparing and posting the notice. If, however, a member wants to notice
to be served on him under a certificate or by registered post with or with acknowledgement
due and has deposited money with the company to defray the incidental expenditure thereof,
the notice must be served accordingly, otherwise service will not be deemed to have been
effect ed.

Accordingly, the questions as asked may be answered as under:

(i) The contention of Dinesh shall be tenable, for the reason that the notice was not properly
served and meetings held by the company shall be invalid.

(ii) In view of the provisions of the Companies Act, 2013, the company is not bound to send
notice to Dinesh at the address outside India. Therefore, answer in the second case shall
differ from the first one.

Question 13

Dev Limited issued a notice for holding of its Annual General Meeting on 7th November, 2005.
The notice was posted to the members on 16.10.2005. Some members of the company allege
that the company had not complied with the provisions of the Companies Act, 2013 with
regard to the period of notice and as such the meeting was not validly called. Referring to the
provisions of the Act, decide:

(i) Whether the meeting has been validly called?

(ii) If there is a short fall in the number of days by which the notice falls short of the statutory
requirement, state and explain by how many days does the notice fall short of the
statutory requirement?

(iii) Can the short fall, if any, be condoned?
Answer

(i) 21 Days clear notice of an AGM must be given [Section 101 (1), Companies Act, 2013]: In case of notice by post, the notice shall be deemed to have been received on expiry of 48 hours from the time of its posting. Besides, for working out clear 21 days, the day of the notice and the day of the meeting shall be excluded. Accordingly, 21 clear days notice has not been served (only 19 clear days notice is served) and the meeting is, therefore, not validly convened.

(ii) As explained in (i) above, notice falls short by 2 days.

(iii) According to proviso to Section 101 (1), an AGM called at a notice shorter than 21 clear days shall be valid if consent is given in writing or by electronic mode by not less than ninety-five per cent. of the members entitled to vote at such meeting.

Question 14

Company served a notice of General Meeting upon its members. The notice stated that a resolution to increase the share capital of the Company would be considered at such meeting. A shareholder complaints that the amount of the proposed increase was not specified in the notice. Is the notice valid?

Answer

Under section 102(2)(b) in the case of any meeting other than an AGM, all business transacted thereat shall be deemed to be special business.

Further under section 102 (1), a statement setting out the following material facts concerning each item of special business to be transacted at a general meeting, shall be annexed to the notice calling such meeting, namely:—

(a) the nature of concern or interest, financial or otherwise, if any, in respect of each items, of:
   (i) every director and the manager, if any;
   (ii) every other key managerial personnel; and
   (iii) relatives of the persons mentioned in sub-clauses (i) and (ii);

(b) any other information and facts that may enable members to understand the meaning, scope and implications of the items of business and to take decision thereon.

Thus, the objection of the shareholder is valid since the details on the item to be considered are lacking. The information about the amount is a material fact with reference to the proposed increase of share capital. The notice is, therefore, not a valid notice under Section 102 of the Companies Act, 2013.

Question 15

Who are entitled to get notice for the general meeting called by a Public Limited Company registered under the Companies Act, 2013? Does the non-receipt of a notice of the meeting by
any one entitled to such notice invalidate the meeting and the resolution passed thereat? What would be your answer in case the omission to give notice to a member is only accidental omission?

Answer

Under section 101 (3) of the Companies Act, 2013 “Notice” of every meeting of the company shall be given -

(i) to every member of the company, legal representative of any deceased member, or the assignee of an insolvent member;

(ii) to every director of the company;

(iii) to a auditor or auditors and,

The private company, which is not, a subsidiary of a public company may prescribe, by its Articles, persons to whom the notice should be given.

Any accidental omission or the non receipt of notice by any member or other person entitled to such notice shall not invalidate the proceedings in the meeting [Section 101 (4)].

However, omission to serve notice of meeting on a member on the mistaken ground that he is not a shareholder cannot be said to be an accidental omission. Accidental omission means that the omission must be not only designed but also not deliberate. [Maharaja Export Vs. Apparels Exports Promotion Council (1986)].

Question 16

ABC Limited served a notice of a general meeting upon its members. The notice stated that a resolution to increase the Share Capital of the company would be considered at the meeting. A member complains to the company that the amount of the proposed increase was not specified in the notice. In the light of the provisions of the Companies Act, 2013, examine the validity of the notice.

Answer

Under section 102(2)(b) in the case of any meeting other than an AGM, all business transacted thereat shall be deemed to be special business.

Further under section 102 (1), a statement setting out the following material facts concerning each item of special business to be transacted at a general meeting, shall be annexed to the notice calling such meeting, namely:—

(a) the nature of concern or interest, financial or otherwise, if any, in respect of each items, of:

(i) every director and the manager, if any;

(ii) every other key managerial personnel; and

(iii) relatives of the persons mentioned in sub-clauses (i) and (ii);
(b) any other information and facts that may enable members to understand the meaning, scope and implications of the items of business and to take decision thereon.

Thus, the objection of the member is valid since the details about the amount is a material fact with reference to the proposed increase of share capital. The notice is, therefore, not a valid notice under Section 102 of the Companies Act, 2013.

Question 17

M. H. Company Limited served a notice of general meeting upon its shareholders. The notice stated that the issue of sweat equity shares would be considered at such meeting. Mr. ‘A’, a shareholder of the M. H. Company Limited complains that the issue of sweat equity shares was not specified fully in the notice. Is the notice issued by M. H. Company Limited regarding issue of sweat equity shares valid according to the provisions of the Companies Act, 2013? Explain in detail.

Answer

Under section 102 (2) (b) in the case of any meeting other than an AGM, all business transacted thereat shall be deemed to be special business.

Further under section 102 (1) a statement setting out the following material facts concerning each item of special business to be transacted at a general meeting, shall be annexed to the notice calling such meeting:

(a) the nature of concern or interest, financial or otherwise, if any, in respect of each items, of every director and the manager, if any or every other key managerial personnel and relatives of such persons; and

(b) any other information and facts that may enable members to understand the meaning, scope and implications of the items of business and to take decision thereon.

Thus, the objection of the member is valid since the complete details about the issue of sweat equity should be sent with the notice. The notice is, therefore, not a valid notice under Section 102 of the Companies Act, 2013.

Question 18

ABC Ltd. called its annual general meeting on 7th April, 2010. The notice of AGM was posted on 16th March, 2010. One member holding 20 shares wishes to challenge the resolutions passed at the AGM on the ground that the notice was not valid. What advise would you give to him?

Answer

According to Section 101(1) of the Companies Act, 2013 a general meeting of a company may be called by giving not less than 21 clear days notice in writing or through electronic mode. 21 clear days means that the notice period will exclude both the date on which the notice was served and the date of the meeting.
In case the notice of the general meeting is sent by post, service of notice of the meeting shall be deemed to have been effected at the expiry of 48 hours after it was posted.

In the instant case, the notice was short of one day as per the section:

16th March to 7th April 23 days
Less date of service and date of meeting 2 days
Clear number of days of notice 21 days
Less 48 hours of posting 2 day
19 days

Therefore, the meeting was invalid and the resolutions passed were invalid. However in case AGM, where at least 95% of the members entitled to vote consent to a shorter notice in writing or by electronic mode, have so consented the meeting may be held on shorter notice.

In Saliesh Harilal Shah v. Matushree Textiles Ltd. (1994) 2CLJ, 291, the Bombay High Court [in contrast to the Madras High Court decision in N. Chettair(v) the Madras Race Club (1951)] held that the requirement of the section as length of notice is directly only and not mandatory. A couple of shareholders cannot be permitted to defeat the interest of the large body of shareholders by saying that the duration of the notice was not sufficient even if the short notice does not indicate any prejudice to the complaining shareholders.

Therefore, the member may be advised to explore whether he has suffered any prejudice by the short notice before proceeding to challenge the validity of the resolution.

**Question 19**

The annual general meeting for 2006-2007 and 2007-08 were convened on 7-10-2009 belatedly and with great difficulty. The notice of the meeting was published in a newspaper of Calcutta on 12-9-2009. The shareholders received the notice 22-9-2009 which was shown to have been posted on 16-9-2009. The notice was dated 9-9-2009. D sought an injunction that the resolutions passed at the meetings are not given effect to, on the ground that the notice was received by him on 22-9-2009. D held only seven shares of ₹10 in the company and was a resident of Kolkata where the meeting was to be held.

State whether the shortness of the notice invalidated the meeting?

**Answer**

Section 101 (4) of the Companies Act, 2013 makes it abundantly that it is not a condition precedent to the holding of the annual general meeting of a company that a clear 21 days notice must be given to each and every member of the company. The accidental omission to give notice to any member or non-receipt of notice by any member shall not invalidate the proceedings at the meeting.

In the present case therefore, the contention of D cannot be upheld. He cannot hijack the proceedings of the entire meeting for an accidental delay in receipt of notice by him.
Question 20

Mr. DP, Secretary, of City Handicrafts Ltd. called an extraordinary general meeting of the company on the requisition of some members. Mr. DP, Secretary of the Company, issued notice of the meeting without the authority of the Board of Directors. Discuss on the validity of the notice issued by Mr. DP, Secretary of the City Handicrafts Ltd.

Answer

The Annual General Meeting or Extra-ordinary General Meeting can be called only with authority of Board of Directors i.e. by passing necessary resolution in the Board Meeting or by Circular resolution. An Annual General Meeting or Extra-ordinary General Meeting cannot be called by an individual director or some of the directors or by secretary. Now, in the instant case, Mr. DP, Secretary of City Handicrafts Ltd., called an extraordinary general meeting on requisition of some members. He issued notice of the meeting without the authority of the Board of Directors. The Secretary of the company does not have the power to call the meeting by himself by issuing notices. Unless the Secretary is specifically authorized either by the board of directors or by the articles, any meeting called by him and the business done there at it would be null and void (Al Amin Seatrans Ltd. Vs. Owners and Party Interested in Vessel M V “Loyal Bird”).

However, the notice of the meeting may be ratified by the Board of Directors of the company before the meeting is held to make it good (Hooper Vs. Kerr. Stuart & Co.). Thus, the notice issued by Mr. DP may be ratified by the Board of Directors of City Handicrafts Ltd., to make it valid.

Special and Ordinary Business

Question 21

Referring to the provisions of the Companies Act, 2013 state the matters relating to ‘Ordinary Business’ which may be transacted at the Annual General Meeting of a Company. What kinds of resolutions need to be passed to transact the ‘ordinary Business’ and the ‘Special Business’ at the Annual General Meeting of the Company? Explain.

OR

State the ordinary business which may be transacted at an Annual General Meeting of a public limited company incorporated under the Companies Act, 2013.

Answer

(i) Ordinary Business [Section 102 (2)]: In accordance with the provision of Companies Act, 2013 as contained in Section 102 (2), the only ordinary business can be transacted at an AGM and comprises of the following business:

(a) Consideration of financial statements and the reports of the Board of Directors and auditors.

(b) Declaration of dividend.
(c) Appointment of Directors in place of those retiring; and
(d) appointment of auditors and fixation of their remuneration.

(iii) Special Business: Any other business transacted at the annual general meeting or at any other meeting of the members shall be deemed to be special business.

Ordinary business can be passed by an ordinary resolution. However, special business may be transacted either by passing ordinary resolution or special resolution, depending upon the requirements of Companies Act, 2013.

Question 22

Explain what is meant by "Financial statement" as per the Companies Act, 2013.

Answer

Financial statement- As per section 2(40) of the Companies Act, 2013, Financial Statement in relation to a company includes:

i. A balance sheet as at the end of the financial year
ii. A profit and loss account or in the case of a company carrying on any activity not for profit, an income and expenditure account for the financial year;
iii. Cash flow statement for the financial year;
iv. A statement of changes in equity, if applicable; and
v. Any explanatory note annexed to or forming part of any document referred to in sub-clause (i) to sub clause (iv) provided that the financial statement with respect to one person company, small company and dormant company, may not include the cash flow statement.

Quorum

Question 23

State what is meant by “Quorum” and when does quorum be considered immaterial under the provisions of the Companies Act, 2013.

Answer

Quorum means the minimum number of members that must be present in person in order to constitute a meeting and transact business thereat. Thus quorum represents the minimum number of members on whose presence the meeting of a company can commence its business. Under section 103 (2) in case the quorum is not present within half-an-hour from the time appointed for holding a meeting of the company the meeting shall stand adjourned to the same day in the next week at the same time and place, or to such other date and such other time and place as the Board may determine; or the meeting, if called by requisitionists under section 100, shall stand cancelled. Therefore, the quorum is an extremely important element of a validly held meeting.
Under the Companies Act, 2013 quorum is never considered immaterial in the holding of a valid meeting. However, under only one situation a meeting will be validly held even if the quorum is not present. If all the members are present, it is immaterial that the quorum required by the Articles is more than the total number of members and in such a case the meeting will be validly held even if the quorum as laid out in the Articles is not present. If for example, the Articles of a private company provide that 4 members personally present shall be a quorum and the number of members is reduced to 3, the meeting of members will be validly held when all the 3 members attend the meeting.

**Question 24**

The Articles of Association of X Ltd. require the personal presence of 7 members to constitute quorum of General Meetings. The following persons were present in the extra-ordinary meeting to consider the appointment of Managing Director:

(i) A, the representative of Governor of Madhya Pradesh.
(ii) B and C, shareholders of preference shares,
(iii) D, representing Y Ltd. and Z Ltd.
(iv) E, F, G and H as proxies of shareholders.

Can it be said that the quorum was present in the meeting?

**Answer**

**Quorum:** In this case the quorum for holding a general meeting is 7 members to be personally present. For the purpose of quorum, only those members are counted who are entitled to vote on resolution proposed to be passed in the meeting.

Again, only members present in person and not by proxy are to be counted. Hence, proxies whether they are members or not will have to be excluded for the purposes of quorum.

If a company is a member of another company, it may authorize a person by resolution to act as its representative at a meeting of the latter company, then such a person shall be deemed to be a member present in person and counted for the purpose of quorum. Where two or more companies which are members of another company, appoint a single person as their representative then each such company will be counted as quorum at a meeting of the latter company.

Further the President of India or Governor of a State, if he is a member of a company, may appoint such a person as he thinks fit, to act as his representative at any meeting of the company. A person so appointed shall be deemed to be a member of such a company and thus considered as member personally present.

In view of the above there are only three members personally present.

‘A’ will be included for the purpose of quorum. B & C have to be excluded for the purpose of quorum because they represent the preference shares and since the agenda being the
appointment of Managing Director, their rights cannot be said to be directly affected and therefore, they shall not have voting rights. D will have two votes for the purpose of quorum as he represents two companies ‘ Y Ltd.’ and ‘Z Ltd.’ E, F, G and H are not to be included as they are not members but representing as proxies for the members.

Thus it can be said that the requirements of quorum has not been met and it shall not constitute a valid quorum for the meeting.

**Question 25**

DJA Company Ltd. has only 50 preference shareholders. A meeting of the preference shareholders who called by the company for amending the terms of these shares. Mr. A, was the only preference shareholder who attended the meeting. He, however, held proxies from all other shareholders. He took the Chair, conducted the meeting and passed a resolution for amending the terms of the issue of these shares. Referring to the provisions of the Companies Act, 2013, examine the validity of the meeting and the resolution passed thereat.

**Answer**

Under section 103 (1) unless the articles of the company provide for a larger number, in case of a public company, five members personally present shall be the quorum for a meeting of the company, if the number of members as on the date of meeting is not more than one thousand.

The case given in the question corresponds to the decision. This question was decided in Sharp Vs., Dawes wherein it was held that “The word meeting prima facie means coming together of more than one person.” In this given case, only one shareholder was present and it was held that the meeting was not validly held.

Further in East Vs. Bennet Brothers Ltd. (1911) it has been held that in case of a meeting of a particular class of members if all the shares of that particular class are held by one person, then that one person shall form the quorum.

In the given case therefore, the applicable quorum will be 5 members and since all the shares are not held by one person but there are 50 members, no quorum is therefore present. The meeting and the resolution passed there shall not be valid.

**Question 26**

State the legal position in the following circumstances with reference to the provisions in the Companies Act, 2013.

At an adjourned extraordinary general meeting of a Public Ltd. Company adjourned for want of quorum, only 3 members are personally present.

**Answer**

In the given case the quorum is not present even at the adjourned meeting as under section 103 (1) the quorum in a public company shall be five members personally present if the
number of members as on the date of meeting is not more than one thousand. Such a meeting stands adjourned to the same day in the next week at the same time and place, or to such other date and such other time and place as the Board may determine

Further, under section 103 (3) of the Companies Act, 2013 if at the adjourned meeting also, a quorum is not present within half-an-hour from the time appointed for holding meeting, the members present shall be the quorum. Hence, the 3 members personally present at the adjourned meeting shall constitute a valid quorum to conduct the meeting.

Question 27

The quorum for a General meeting of a public company is 15 members personally present according to the provisions of the articles of association of the company. Examine with reference to the provisions of the Companies Act, 2013 whether there is proper quorum at a General meeting of the company which was attended by the following persons:

(i) 13 members personally present
(ii) 2 members represented by proxies who are not members of the company
(iii) One person representing two member companies.

Answer

In the given case the Articles of the company provide for 15 members personally present to form the quorum of a general meeting. In determining the quorum, members personally present or deemed to be personally present shall be counted only. In the present case therefore, the present members counted will be 13 + 2 (the person representing two member companies will be counted as 2 and not as 1) = 15. Hence, the quorum is present and the meeting can be validly held.

Question 28

A general meeting of a public company was adjourned by the chairman for want of quorum. Fresh notice was not served for the adjourned meeting. Do you feel that notice is required for the adjourned meeting? Referring to the provisions of the Companies Act, 2013 state the minimum number of members required to be present in the adjourned meeting.

Answer

As per section 103 (2) of the Companies Act, 2013, if the quorum is not present within half an hour from the time appointed for holding a meeting, the meeting, shall stand adjourned to the same day in the next week, at the same time and place unless the directors determine otherwise. No fresh notice is, therefore, required to hold the adjourned meeting.

Further, under section 103 (3) of the Companies Act, 2013, if at the adjourned meeting also, a quorum is not present within half-an-hour from the time appointed for holding meeting, the members present shall be the quorum. Therefore, there is no necessity for a minimum number of members to be present in the adjourned meeting.
Question 29

The articles of X & Co. Ltd provide that in the event of the quorum being not present within half-an-hour from the time scheduled for the annual general meeting, the meeting shall stand dissolved. At the AGM of X & Y Ltd the quorum is not formed within half-an-hour from the time fixed therefor.

Give the answers of the following-

(a) In the above circumstance, what further steps are necessary to hold the annual general meeting?

(b) If it is to be convened afresh, will a fresh resolution of the Board be needed?

(c) What will be the position of retiring directors—will they cease to be directors from the date on which the general meeting could not be held for want of quorum and consequently stood dissolved as per the articles as aforesaid or will they remain directors till the date of the fresh annual general meeting which was convened subsequent to the first one?

Answer

(a) Under section 103 (2) of the Companies Act, 2013 if the quorum is not present within half-an-hour from the time appointed for holding a meeting of the company the meeting shall stand adjourned to the same day in the next week at the same time and place, or to such other date and such other time and place as the Board may determine. The law does not give any flexibility to the Articles in deciding the fate of an adjourned meeting. The right exists with the Board of Directors. In the present case therefore, the act of dissolution of the AGM for want of quorum is invalid. The meeting automatically gets adjourned to the same time and place on the same day next week. The Board has from the facts in the question, has not exercised their option of holding the meeting at a different place and time.

(b) In case of an adjourned meeting or of a change of day, time or place of meeting, the company shall give not less than three days notice to the members either individually or by publishing an advertisement in the newspapers (one in English and one in vernacular language) which is in circulation at the place where the registered office of the company is situated. Hence, no board resolution will be required but a notice from the company as mentioned will have to be sent. However, it may be noted that the decision to change the date, time and venue by the Board will have to be taken by a resolution of the Board, it will be in practicality been passed.

(c) The provision in the Article dissolving a meeting for want of quorum is not legally valid. The meeting will be adjourned and hence the retiring directors will continue to hold office till the adjourned meeting is held and the required decision taken.
Question 30

Whether the following persons can be counted for the purposes of quorum in a general meeting of a public company-

(a) a person representing three member companies;
(b) both the joint owners of shares present at the meeting;
(c) a single member present at the meeting.

Answer

(a) A person representing three member companies will be counted as 3 in the computation of the quorum. There is no restriction on a member company in appointing a person as a representative who has already been nominated to represent another company member. Each company will be treated as personally present even if the representative is the same person.

(b) For the purpose of quorum, joint shareholders will be collectively regarded as one shareholder.

(c) The single member present at the meeting will be counted as one in the computation of the quorum.

Question 31

Unless the Articles provide for a large number, the quorum for a General Meeting for a public limited company is:

(a) 1/3rd of the member
(b) 5 members personally present
(c) 2 members
(d) 7 members

Answer

Answer (b), in terms of section 103 (1) of the Companies Act, 2013

Question 32

State whether the following statements are correct or incorrect:

“Under the Companies Act, 2013, if the General Meeting is adjourned for want of Quorum, then in case of change in the day, title, place of the adjourned meeting, the company is required to give not less than 7 days notice to the members individually or by press announcement”.

Answer

Incorrect
Proxies

Question 33

What do you mean by Proxy? Explain the provisions relating appointment of Proxy under the Companies Act, 2013

Answer

A proxy is a person appointed by a member of a company, to attend a meeting of the company and vote thereat on his behalf.

The various provisions relating to the appointment of a proxy under the Companies Act, 2013 are as under:

1. Under section 105 (1) any member of a company entitled to attend and vote at a meeting of the company shall be entitled to appoint another person as a proxy to attend and vote at the meeting on his behalf.

2. A proxy shall not have the right to speak at such meeting and shall not be entitled to vote except on a poll. This means that a proxy cannot vote on a resolution by a show of hands.

3. The Central Government may prescribe a class or classes of companies whose members shall not be entitled to appoint another person as a proxy.

4. Under section 105 (6) the instrument appointing a proxy shall be in writing; and be signed by the appointer or his attorney duly authorised in writing or, if the appointer is a body corporate, be under its seal or be signed by an officer or an attorney duly authorised by it.

5. Under section 105 (7) an instrument appointing a proxy, if in the form as may be prescribed, shall not be questioned on the ground that it fails to comply with any special requirements specified for such instrument by the articles of a company.

Question 34

Annual General Meeting of a Public Company was scheduled to be held on 15.12.2003. Mr. A, a shareholder, issued two Proxies in respect of the shares held by him, one in favour of Mr. ‘X’ and the second in favor of Mr. T. The proxy in favour of ‘T’ was lodged on 12.12.2003 and the one in favour of Mr. X was lodged on 15.12.2003. The company rejected the proxy in favour of Mr. X as the proxy in favour of Mr. T was of dated 12.12.2003 and the one in favour of Mr. X was of dated 13.12.2003. Is the rejection by the company in order?

Answer

In case more than one proxies have been appointed by a member in respect of the same meeting, one which is later time shall prevail and the earlier one shall be deemed to have been revoked. Thus, in the normal course, the proxy in favour of Mr. X, being later in time, should have been upheld as valid.
However, as per Section 105 (4) of the Companies Act, 2013, a proxy should be deposited 48 hours before the time of the meeting. In the given case, the proxies should have, therefore, been deposited on or before 13.12.2003 (the date of the meeting being 15.12.2003). X deposited the proxy on 15.12.2003. Therefore, proxy in favour of Mr. X has become invalid. Proxy in favour of T is valid since it is deposited in time.

Question 35

What is the concept of proxy in relation to the meetings of a Company? Decide the appointment and rights of a proxy, under the Companies Act, 2013 in the following cases:

(i) When a body corporate is a member in the company.

(ii) When a foreign company is a member in the company.

Answer

Under section 105 (1) of the Companies Act, 2013 a proxy is a person, who is appointed by a member of a company to attend a meeting of the company and vote thereat on his behalf. The objective of allowing a proxy to attend a meeting on behalf of a member is to enable a member to exercise his right to vote on a resolution placed before the meeting. However, a proxy cannot speak at the meeting nor can he vote except on a “Poll”

(i) In the present case as the member is a body corporate, in terms of section 105 (6) of the Companies Act, 2013 the instrument appointing a proxy shall be duly authorized in writing and should be under its seal or be signed by an officer or an attorney duly authorized by it.

   In terms of the first proviso to section 105 (1), the proxy so appointed shall have the right to attend the meeting of the company on behalf of the body corporate “member” and vote on its behalf at the meeting. However, the proxy shall have no right to speak at the meeting and cannot vote thereat except in a “Poll”

(ii) The Companies Act, 2013 does not distinguish between the appointment and rights of proxies by domestic or foreign companies. The applicable law applies uniformly to both.

Question 36

Annual General Meeting of MGR Limited is convened on 28th December, 2008. Mr. J, who is a member of the company, approaches the company on 28th December, 2008 and demands inspection of proxies lodged with the company. Explain the legal position as stated under the Companies Act, 2013 in this regard.

Answer

Under section 105 (8) of the Companies Act, 2013 every member entitled to vote at a meeting of the company or on any resolution to be moved thereat, shall be entitled during the period beginning 24 hours before the time fixed for the commencement of the meeting and ending with the conclusion of the meeting, to inspect the proxies lodged, at anytime during the
business hours of the company. Provided not less than 3 days’ notice in writing of the intention to inspect is given to the company.

In the given case, Mr. J who is a member approaches the company on 28th December and demands inspection of proxies lodged with the company. Based on the above provisions since prior notice of 3 days had not been given by Mr. J to the company for inspecting the proxies, the company may refuse inspection of proxy forms.

Question 37

‘S’, a shareholder, after duly appointing P as his proxy for a meeting, himself attended the meeting and voted on a resolution. P thereafter claimed to exercise his vote. Examine his claim.

Answer

As per law, a shareholder has a right to revoke the proxy’s authority by voting himself before the proxy has voted - but once the proxy has voted he cannot retract his authority. In the given case S had voted on the resolution himself and the proxy wanted to exercise his right after he had voted. Therefore P’s claim in the given case is invalid. This point was reiterated in Cousins v. International Brick Co. Ltd also.

Question 38

The Articles of Association of a public company require the instrument appointing a proxy to be received by the company 75 hours before the meeting. Is it a valid requirement? If not, what are its effect?

Answer

According to Section 105 (4) of the Companies Act, 2013, any provision in the Articles of a company which requires a longer period than 48 hours before a meeting of the company for depositing a proxy, shall have effect as if a period of 48 hours had been specified for such deposit. Therefore in the given case, the answer is a ‘no’.

Question 39

S, a shareholder, gives a notice for inspecting proxies, five days before the meeting is scheduled and approaches the company two days before the scheduled meeting for inspecting the same. What is the legal position relating to his actions?

Answer

Under section 105 (8) of the Companies Act, 2013 every member entitled to vote at a meeting of the company, or on any resolution to be moved thereat, shall be entitled during the period beginning twenty-four hours before the time fixed for the commencement of the meeting and ending with the conclusion of the meeting, to inspect the proxies lodged, at any time during the business hours of the company, provided not less than three days’ notice in writing of the intention so to inspect is given to the company.
In the given case, S has given proper notice.

However, such inspection can be undertaken only during the period beginning 24 hours before the time fixed for the commencement of the meeting and ending with the conclusion of the meeting. So S can undertake the inspection only during the above mentioned period and not two days prior to the meeting.

**Question 40**

A General Meeting to be held on 15th April, 2010 at 4.00 P.M. As per the notice the members who are unable to attend the meeting in person can appoint a proxy and the proxy forms duly filled should be sent so as to reach at least 48 hours before the meeting. Mr. A, a member of the company appoints Mr. P as his proxy and the proxy form dated 10.4.2010 was deposited by Mr. P with the company at its Registered Office on 11.04.2010. However, Mr. A changes his mind and on 12.04.2010 gives another proxy to Mr. Q and it was deposited on the same day with the company. Similarly another member Mr. B also gives to separate proxies to two individuals named Mr. R and Mr. S. In the case of Mr. R, the proxy dated 12.04.2010 was deposited with the company on the same day and the proxy form in favour of Mr. S was deposited on 14.04.2010. All the proxies viz., P, Q, R and S were present before the meeting.

*In the light of the relevant provisions of the Companies Act, who would be the persons allowed to represent at proxies for members A and B respectively?*

**Answer**

A Proxy is an instrument in writing executed by a shareholder authorizing another person to attend a meeting and to vote thereat on his behalf and in his absence. As per, the provisions of Section 105 (1) of the Companies Act, 2013 every shareholder who is entitled to attend and vote has a statutory right to appoint another person as his proxy and the proxy need not be a member of the company. Further, any provision in the articles of association of the company requiring instrument of proxy to be lodged with the company more than 48 hours before a meeting shall have effect as if 48 hours had been specified therein. The members has a right to revoke the proxy’s authority by voting himself before the proxy has voted but once the proxy has voted the member cannot retract his authority.

Where two proxy instruments by the same shareholder are lodged in respect of the same votes before the expiry of the time for lodging, there the proxies, the second in time will be counted and where one is lodged before and the other after the expiry of the date fixed for lodging proxies, the former will be counted. Thus in case of Member A, the proxy Q (and not Proxy P) will be permitted to vote on his behalf. However, in the case of Member B, the proxy R (and not Proxy S) will be permitted to vote as the proxy authorizing S to vote was deposited in less than 48 hours before the meeting.
Question 41

C, a shareholder, after appointing B as his proxy at meeting of the Company, himself attended the meeting and voted on a particular resolution. B thereafter claimed to exercise his vote. Examine his claim in the light of the provisions of the Companies Act, 2013.

Answer

B’s claim is invalid. Where a shareholder who having appointed a proxy, personally attends and votes at the meeting, the proxy is revoked thereby. Thus in the instant case, B’s authority is revoked and he cannot exercise his vote.

Question 42

K, a member of MNO Limited, appoints L as his proxy to attend the general meeting of the company. Later he (K) also attends the meeting. Both K (the member) and L (the proxy) voted on a particular resolution in the meeting. K’s vote was declared invalid by the chairman stating that since he has appointed the proxy and L’s vote has been considered as valid. K objects to the decision of the Chairman. Decide, under the provisions of the Companies Act, 2013, whether K’s objection shall be taxable.

Answer

The given problem is based on Cousins vs International Brick Company Limited. In above case the court held that a proxy is appointed to attend a meeting on an implied condition that he will attend if the person appointing the proxy is himself unable to attend the meeting. But if the person appointing also attends the meeting and casts the vote the proxy’s stand will be cancelled.

Hence, in the given problem, the decision of chairman is invalid. Here K’s vote was valid, L’s vote was invalid. Therefore K’s objection is legitimate,

Resolution

Question 43

Outline some eight matters for which an ordinary resolution would suffice.

Answer

A resolution is said to be an ordinary resolution when the votes cast in favour of the resolution are greater than the votes cast against it. In other words, when a resolution is passed with simple majority, it is an ordinary resolution.

Under various provisions of the Companies Act, 2013, an ordinary resolution is sufficient, for conducting any of the following businesses:

(a) Change in name of the company under section 4 (5) (ii) (b) (i) at the direction of the Registrar in case of reservation of wrong or incorrect name;
(b) Rectification of the name of the company under section 16 (1) after being directed by the Central Government to do so.;

(c) To appoint auditors in an annual general meeting;

(d) To appoint directors in an annual general meeting;

(e) Consideration and adoption of the financial statements and the report of the directors and the auditors in an annual general meeting;

(f) To declare dividends at an annual general meeting;

(g) To appoint any person as an auditor other than the retiring auditor under section 140 (4);

(h) Under section 142 (1) the remuneration of an auditor shall be fixed in general meeting by an ordinary resolution;

(i) Appointment of any person as director in case of vacancy created due to removal [section 169 (2)]

(j) Remuneration of cost accountant under section 148 (3) shall be fixed by an ordinary resolution.

**Question 44**

*Mention any ten acts for which a special resolution is required.*

**Answer**

**Acts for which special resolutions are required:** Some matters may be so important and outside the ordinary course of the company's business, such as any important constitutional changes, that safeguards should be imposed to ensure that a larger majority than a simple majority of the members approve of them before they are given effect to. The Act requires that the following matters, *inter alia*, have to be resolved by the company, by a special resolution:

1. To alter any provision contained in the memorandum, [Section 13(1)];
2. To alter the articles of association [Section 14 (1)];
3. Variation in the terms of contract or objects in the prospectus [section 27 (1)];
4. Issue of Sweat Equity [Section 54 (1) (a)]
5. To purchase its own shares or specified securities [Section 68 (2)];
6. To reduce the share capital as per section 100 of the Companies Act, 1956 [i.e., Section 66 (1) of the Companies Act, 2013, not yet notified];
7. To move the registered office of an existing company outside the local limits of any city, town or village where such office is situated at the commencement of this Act [Section 12 (5)(a)]
8. To move the registered office of any other company outside the local limits of any city, town or village where such office is first situated [Section 12 (5)(b)]
(9) Giving of any loan or guarantee or providing any security in excess of specified limits [Section 186 (3)];
(10) To issue debentures with an option of conversion into shares [Section 71 (1)].

Question 45
State with reason, whether the following statement is correct or incorrect, according to the Companies Act, 2013.

A special resolution is one to pass, where the votes cast in favors must be twice the votes cast against it.

Answer
Incorrect. A resolution shall be a special resolution when the votes cast in favour of the resolution by members (whether on a show of hands, or on a poll, or by proxy), are not less than three times the number of votes, if any, cast against the resolution.

Question 46
Which one of the following required ordinary resolution?
1. to change the name of the company
2. to alter the articles of association
3. to reduce the share capital
4. to declare dividends.

Answer
An ordinary resolution is required to declare dividends;

The declaration of dividend is one of the ordinary businesses conducted at every AGM of a company under section 102 (2) of the Companies Act, 2013 and each ordinary business transacted at an AGM requires an ordinary resolution to approve the same.

Question 47
At a General meeting of a company, a matter was to be passed by a special resolution. Out of 40 members present, 20 voted in favour of the resolution, 5 voted against it and 5 votes were found invalid. The remaining 10 members abstained from voting. The Chairman of the meeting declared the resolution as passed.

With reference to the provisions of the Companies Act, 2013, examine the validity of the Chairman’s declaration.

Answer
Under Section 114(2) of the Companies Act, 2013, for a valid special resolution to be passed at a meeting of members of a company, the following conditions need to be satisfied:
(i) The intention to propose the resolution, as a special resolution must have been specified in the notice calling the general meeting or other intimation given to the members;

(ii) The notice required under the Companies Act must have been duly given of the general meeting;

(iii) The votes cast in favour of the resolution (whether by show of hands or electronically or on a poll, as the case may be) by members present in person or by proxy or by postal ballot are not less than 3 times the number of votes, if any, cast against the resolution by members so entitled and voting.

Thus, in terms of the requisite majority, votes cast in favour have to be compared with votes cast against the resolution. Abstentions or invalid votes, if any, are not to be taken into account.

Accordingly, in the given problem, the votes cast in favour (20) being more than 3 times of the votes cast against (5), and presuming other conditions of Section 114(2) are satisfied, the decision of the Chairman is in order.

Question 48

Explain the provisions of the Companies Act, 2013 relating to ‘Resolutions requiring Special Notice’. State the resolutions that require ‘Special Notice’ under the Act.

Answer

Under section 115 of the Companies Act, 2013 where, by any provision contained in this Act or in the articles of a company, special notice is required of any resolution, notice of the intention to move such resolution shall be given to the company by such number of members holding not less than one per cent. of total voting power or holding shares on which such aggregate sum not exceeding five lakh rupees, as may be prescribed, has been paid-up and the company shall give its members notice of the resolution in such manner as may be prescribed.

Special notice is required to move, the following resolutions and any such further resolutions as may be prescribed by the Articles:

(i) Section 140: a resolution appointing an auditor other than the retiring one.

(ii) Section 140: a resolution providing expressly that the retiring auditor shall not be reappointed.

(iii) Section 169: a resolution purporting to remove a director before the expiry of his period of office.

(iv) Section 169: a resolution to appoint another director in place of the removed director.
Passing of Resolution by Postal Ballot [Section 110]

Question 49

State the procedure for passing a resolution by Postal Ballot.

OR

Explain the provisions of the Companies Act, 2013 relating to the procedure to be followed for transacting business of the general meeting of members of a company through postal ballot.

Answer

Section 110 of the Companies Act 2013, provides as under:

Sub section (1): Notwithstanding anything contained in this Act, a company—

(a) shall, in respect of such items of business as the Central Government may, by notification, declare to be transacted only by means of postal ballot; and

(b) may, in respect of any item of business, other than ordinary business and any business in respect of which directors or auditors have a right to be heard at any meeting, transact by means of postal ballot,

In such manner as may be prescribed, instead of transacting such business at a general meeting.

Sub section (2) states that if a resolution is assented to by the requisite majority of the shareholders by means of postal ballot, it shall be deemed to have been duly passed at a general meeting convened in that behalf.

The procedure as laid down in the Companies (Management & Administration) Rules, 2014 read with the provisions of section 110 of the Companies Act is as under:

(i) Where a company is required to pass any resolution by way of postal ballot, it shall send a notice to all the shareholders, along with a draft resolution explaining the reasons therefore and requesting them to send their assent within a period of 30 days from the date of posting of the letter;

(ii) The notice shall be sent by registered post or speed post or through electronic means like registered e-mail address or through courier service for facilitating the communication of the assent or dissent of the shareholder to the resolution within the said period of thirty days;

(iii) The board of directors shall appoint one scrutinizer, who is not in employment of the company, and who, in the opinion of the board can conduct the postal ballot voting process in a fair and transparent manner. The scrutinizer shall be willing to be appointed and be available for the purpose of ascertaining the requisite majority.

(iv) The scrutinizer shall submit his report as soon as possible after the last date of receipt of postal ballots but not later than seven days thereof.
(v) If a resolution is passed by the requisite majority of the shareholders by means of postal ballot, it shall be deemed to have been passed at a general meeting convened in that behalf.

(vi) If a shareholder sends his assent or dissent in writing on a postal ballot and thereafter any person fraudulently defenses or destroys the ballot paper or declaration of the identity of shareholder, such person shall be punishable with imprisonment for a term which may extend to six months or with fine or both;

(vii) The scrutinizer shall maintain a register either manually or electronically, to record the assent or dissent received, mentioning the particulars of name, address, folio number, number of shares, nominal value of shares, whether the shares have voting, differential voting or non-rights and the scrutinizer shall also maintain record for postal ballot which are received in defaced or mutilated form and forms which are invalid.

(viii) The postal ballot and all other papers relating to postal ballot will be under the safe custody of the scrutinizer till the Chairman considers, approves and signs the minutes of the meeting. Thereafter, the scrutinizer shall return the ballot papers and other related papers/register to the company so as to preserve such ballot papers and other related papers/registers.

Minutes

Question 50

In a General Meeting of PQR Limited, the Chairman directed to exclude certain matters detrimental to the interest of the company from the minutes. M, a shareholder contended that the minutes of the meeting must contain fair and correct summary of the proceedings thereat. Decide, whether the contention of M is maintainable under the provisions of the Companies Act, 2013?

Or

The minutes of the meeting must contain fair and correct summary of the proceedings thereat. Can the Chairman direct exclusion of any matter from the minutes? Some of the shareholders insist on inclusion of certain matters which are regarded as defamatory of a Director of the company. The Chairman declines to do so. State how the matter can be resolved.

Answer

Under Section 118 (5) of the Companies Act, 2013 there shall not be included in the Minutes of a meeting, any matter which, in the opinion of the Chairman of the meeting:

(i) is or could reasonably be regarded as defamatory of any person;
(ii) is irrelevant or immaterial to the proceeding; or
(iii) is detrimental to the interests of the company;
Further under section 118 (6) the chairman shall exercise absolute discretion in regard to the inclusion or non-inclusion of any matter in the Minutes on the grounds specified in sub-section (5) above.

Hence, in view of the above, the contention of M, a shareholder of PQR Limited is not valid because the Chairman has absolute discretion on the inclusion or exclusion of any matter in the minutes for aforesaid reasons.

**Question 51**

*State the procedure for inspection of Minutes Book of General Meetings of a company, by the members.*

**Answer**

Following are the provisions relating to the procedure for inspection of minutes books of general meetings of a company by the members:

1. Under section 119 (1) of the Companies Act, 2013 the books containing the Minutes of the proceedings of any general meeting of a company shall-
   - be kept at the registered office of the company, and
   - be open, during business hours, to the inspection of any member without charge, subject to such reasonable restrictions as the company may, by its articles or in general meeting impose, so however that not less than two hours in each day are allowed for inspection.

2. Section 119 (2) states that any member shall be entitled to be furnished, within seven working days after he has made a requisition in that behalf to the company, and on payment of such fee as may be prescribed, with a copy of any minutes referred to in sub-section (1) above.

3. Section 119 (3): If any inspection required under sub-section (1) is refused, or if any copy required under sub-section (2) is not furnished within the time specified therein, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees in respect of each offence.

4. Section 119 (4): In the case of any such refusal or default, the Tribunal may, by order, direct an immediate inspection of the Minute books or direct that the copy required shall forthwith be sent to the person requiring it.

**Question 52**

*XYZ Limited held its Annual General Meeting on September 15, 2006. The meeting was presided over by Mr. V, the Chairman of the Company’s Board of Directors. On September 17, 2006, Mr. V, the Chairman, without signing the minutes of the meeting, left India to look after his father who fell sick in London. Referring to the provisions of the Companies Act, 2013, the company...*
6.147  Business Law, Ethics and Communication

state the manner in which the minutes of the above meeting are to be signed in the absence of Mr. V and by whom.

OR

The last General Meeting was conducted by the Chairman on 12th August, 2008. Thereafter, on 19th August, 2008, the Chairman died, before the minutes of the said meeting could be signed. In such an eventuality, how are the minutes book to be dated and signed? Discuss in terms of the provisions of the Companies Act, 2013.

Answer

Section 118 of the Companies Act, 2013 provides that every company shall prepare, sign and keep minutes of proceedings of every general meeting, including the meeting called by the requisitionists and all proceedings of meeting of any class of share holders or creditors or Board of Directors or committee of the Board and also resolution passed by postal ballot within thirty days of the conclusion of every such meeting concerned. Minutes kept shall be evidence of the proceedings recorded in a meeting.

By virtue of Rule 25 of the Companies (Management and Administration ) Rules 2014 read with section 118 of the Companies Act, 2013 each page of every such book shall be initialled or signed and the last page of the record of proceedings of each meeting or each report in such books shall be dated and signed by, in the case of minutes of proceedings of a general meeting, by the chairman of the same meeting within the aforesaid period of thirty days or in the event of the death or inability of that chairman within that period, by a director duly authorized by the Board for the purpose.

Therefore, the minutes of the meeting referred to in the case given above can be signed in the absence of Mr V/ on death of the chairman, by any director who is authorized by the Board.

Question 53

The Board of Directors of Alltronix Ltd, have passed resolution to the effect that no member who is indulging in activities detrimental to the interest of the company be permitted to examine the records or obtain certified copies thereof. A member of the Company, considered by the Company to be acting against the interests of the Company, demands inspection of the register of members and minutes of General Meeting and certified true copies thereof. The Company refuses the inspection etc. on the strength of the resolution referred to above. Examine the correctness of the refusal by the Company referring to the provisions of the Companies Act, 2013.

Answer

According to the provisions contained in Section 119 (1) of the Companies Act, 1956, every member of the Company is entitled to inspect the Register of Members without payment of any fee subject to reasonable restrictions imposed by the company by its Articles. There is no qualification to this right granted to every member of the company and any resolution passed
by the Board to the contrary cannot override the provisions of the Act and will therefore be null and void. Therefore the refusal of the company in the present case is illegal.

**Company Law in a computerized Environment**

**Question 54**

*What is E filing? List at least five advantages of E filing under MCA 21.*

**Answer**

The term E-filing indicates the process of getting services electronically with a comprehensive on-line portal.

Some of the advantages of MCA 21 are:

1. Expeditious incorporation of companies;
2. Simplified and ease of convenience in filing of Forms/Returns;
3. Better compliance management;
4. Total transparency through e-Governance;
5. Customer centric approach;
6. Increased usage of professional certificate for ensuring authenticity and reliability of the Forms/Returns;
7. Building up a centralised database repository of corporate operating;
8. Enhanced service level fulfillment;
9. Inspection of public documents of companies anytime from anywhere;
10. Registration as well as verification of charges anytime from anywhere;
11. Timely redressal of investor grievances;
12. Availability of more time for MCA employees for monitoring and supervision.

**Question 55**

*Explain the 'MCA 21 Program' introduced by the Government of India to develop computerized environment for company law. How does it serve the interest of all the stakeholders of a company, corporate professionals and the public at large?*

**Answer**

This is an innovative project and an initiative of the Ministry of Corporate Affairs to develop a system that would reflect India’s Corporate Governance Goals in the 21st Century and create a business friendly environment for both Indian and Foreign Companies.

This project covers all the services provided by the Registrar of Companies (ROC) starting from the incorporation of a new company. The project would provide e-services including registration of new companies, filing of various returns and statutory documents under the Companies Act, 2013 (and also with respect to the existing sections of the Companies Act,
The system would also enable filing and access for statutory documents like memorandum of association, articles of association, certificate of incorporation etc.

The project serves the interest of all the key stakeholders and the public at large. Also professionals need no longer to visit the officers of ROC and are able to interact with the Ministry using MCA 21 portal from their offices or home. The services of the Ministry of Company Affairs with the introduction of MCA 21 will be e-form driven. Form filing will be done using freely downloadable software and it can be done offline.

The project serves the interest of all the key stakeholders, corporate professionals and the public at large as follows:

- Expeditious incorporation of companies
- Simplified and ease of convenience in filing of Forms/Returns/Statutory documents
- Better compliance management
- Total transparency through e-Governance
- Customer centric approach
- Increased usage of professional certificate for ensuring authenticity and reliability of the Forms/Returns.
- Building up a centralized database repository of corporate operations enhanced service level fulfillment.
- Inspection of public documents of companies anytime from anywhere.
- Registration as well as verification of charges anytime from anywhere
- Timely redressal of investor grievance and to get easy access to relevant records by the public.
- Availability of more time for MCA employees for monitoring and supervision.

Professionals need no longer to visit the officers of ROC and would be able to interact with the Ministry using MCA 21 portal from their offices or home. They are able to provide efficient services to their client companies. Financial Institutions may easily find charges registration and verification. Proactive and effective compliance of relevant laws and corporate governance by the employees.

**Question 56**

*What are the steps for e-Filing?*

**Answer**

1. Select a category to download an eForm from the MCA portal (with or without the instruction kit.)
2. At any time, read the related instruction kit to familiarise with the procedures (download the instruction kit with eform or view it under Help menu).

3. Fill the downloaded e-Form.

4. Attach the necessary documents as attachments.

5. Use the Prefill button in eForm to populate the greyed out portion by connecting to the Internet.

6. The applicant or a representative of the applicant needs to sign the document using a digital signature.

7. Click the Check Form button available in the eForm. System will check the mandatory fields, mandatory attachment(s) and digital signature(s).

8. Upload the eForm for pre-scrutiny. The pre-scrutiny service is available under the Services tab or under the eForms tab by clicking the Upload eForm button. The system will verify (pre-scrutinise) the documents. In case of any inadequacies, the user will be asked to rectify the mistakes before getting the document ready for execution (signature).

9. The system will calculate the fee, including late payment fees based on the due date of filing, if applicable.

10. Payments will have to be made through appropriate mechanisms - electronic (credit card, Internet banking) or traditional means (at the bank counter through challan).

   (a) Electronic payments can be made at the Virtual Front Office (VFO) or at PFO

   (b) If the user selects the traditional payment option, the system will generate 3 copies of pre-filled challan in the prescribed format. Traditional payments through cash, cheques can be done at the designated network of banks using the system generated challan. There will be five banks with estimated 200 branches authorised for accepting challan payments.

11. The payment will be exclusively confirmed for all online (Internet) payment transactions using payment gateways.

12. Acceptance or rejection of any transaction will be explicitly communicated to the applicant (including facility to print a receipt for successful transactions).

13. MCA 21 will provide a unique transaction number, the Service Request Number (SRN) which can be used by the applicant for enquiring the status pertaining to that transaction.

14. Filing will be complete only when the necessary payments are made.

15. In case of a rejection, helpful remedial tips will be provided to the applicant.
6.151  Business Law, Ethics and Communication

16. The applicants will be provided an acknowledgement through e-mail or alternatively they can check the MCA portal.

Exercise

1. C, a member of LS & Co. Ltd., holding some shares in his own name on which final call money has not been paid, is denied by the company voting right at a general meeting on the ground that the articles of association do not permit a member to vote if he has not paid the calls on the shares held by him.

With reference to the provisions of the Companies Act, 2013, examine the validity of company’s denial to C of his voting right.

[Hints: The company’s restriction on C against his voting right is valid, as per section 106 of the Companies Act, 2013]

2. For a special resolution in a Company’s general meeting, 10 voted in favour, 2 against and 4 abstained. The chairman declared the resolution as passed. Is it a valid resolution as per the provisions of the Companies Act, 2013.

[Hints: Yes, as per Section 114(2)(c) of the Companies Act, 2013]

3. The Chairman of the meeting of a company received a Proxy 54 hours before the time fixed for the start of the meeting. He refused to accept the Proxy on the ground that the Articles of the company provided that a Proxy must be filed 60 hours before the start of the meeting. Decide, under the provisions of the Companies Act, 2013 whether the Proxy holder can compel the Chairman to admit the Proxy?

[Hints: Yes, the holder of proxy can compel the chairman as per the Section 105(4) of the Companies Act, 2013]

4. State whether the following statements are correct or incorrect. Give reasons:

   (i) A company should file its annual return within six month of the close of the financial year.
   (ii) The shareholder of the company is general meeting can increase the rate of dividend recommended by the Board of Directors.

[Hints: (I) Incorrect, as per Section 92 (4) of the Companies Act, 2013 (ii) Incorrect as shareholders can decrease the rate but cannot increase the rate of the dividend [Section 102 (2)]

5. Board of Directors of ABC Ltd., called for EGM on 14th January, 2010. Mr. M who is newly appointed as Company Secretary is confused over the issue of sending notices to joint shareholders of the company. Advise Mr. M by referring to the provisions of Companies Act, 2013.

[Hints: In the case of joint shareholders, notices will be deemed to be properly served if the service is effected on the first named of the joint holders as entered in the register of members. Please refer to section 101 and Companies (Management & Administration) Rules 2014 ].
6. Annual General Meeting of a Public Company was scheduled to be held on 15.12.2009. Mr. A, a shareholder, issued two Proxies in respect of the shares held by him in favour of Mr. ‘X’ and Mr. ‘Y’. The proxy in favour of ‘Y’ was lodged on 12.12.2009 and the one in favour of Mr. X was lodged on 15.12.2009. The company rejected the proxy in favour of Mr. Y as the proxy in favour of Mr. Y was of dated 12.12.2009 and thus in favour of Mr. X was of dated 13.12.2009. Is the rejection by the company in order?

[Hints: Proxy in favour of Y is valid since it is deposited in time as given section 105 of the Companies Act, 2013]

7. (i) An annual general meeting of a company was convened in November, 2008. It was adjourned and the adjourned meeting was held in March, 2009. The next general meeting was held in March, 2010. The company was held liable for an irregularity in holding the AGMs. Decide.

(ii) Reliance Industries Ltd. has its registered office at Mumbai. The company desires to hold an extraordinary general meeting in New Delhi. Examine the validity of the company’s desire with reference to the relevant provisions of the Companies Act, 2013.

[Hints: (i) The company is guilty of violation of Section 96 of the Companies Act, 2013. However, please also read the power of the Board to determine the time, date and place of the adjourned meeting.

(ii) The company may hold the EGM at any place and no restriction is imposed in the Companies Act, 2013. Read section 100 fully.]