

EXECUTIVE PROGRAMME

DECEMBER 2011

COMPANY LAW

Time allowed : 3 hours

Maximum marks : 100

NOTE : 1. Answer **SIX** questions including Question No. 1 which is **COMPULSORY**.

2. All references to sections relate to the Companies Act, 1956 unless stated otherwise.

Question 1

Comment on any four of the following :

- (i) *Every company intending to invite deposits from public under section 58A must issue an advertisement which shall be signed by all the directors of the company.*
- (ii) *Doctrine of constructive notice seeks to protect the company against the outsiders.*
- (iii) *Board meetings of the company to be held at the registered office of the company during the working hours on a day that is not a public holiday.*
- (iv) *Dividend can be paid out of capital if the articles of association authorise such payment.*
- (v) *Director Identification Number (DIN) is not mandatory for directors of foreign company having branch offices in India. (5 marks each)*

Answer 1(i)

Prior to the commencement of the Amendment Rules, 1978, the Companies (Acceptance of Deposits) Rules, 1975 required that the advertisement should be signed by all the directors of the company, which created operational difficulties. Therefore, the rule was amended to provide that on or before the date of issue, the advertisement should be signed by a majority of the directors of the company as constituted at the time the Board approved the advertisement or their duly authorised agent in writing and a copy of the same should be delivered to the Registrar for registration. Even a letter of authority is sufficient for this purpose and power of attorney is not necessary [Circular No. 23/75 (91/14/75-CL.XIV) dated 25.9.1975 of the Department of Company Affairs].

Answer 1(ii)

The doctrine of constructive notice seeks to protect the company against the outsiders. The doctrine of constructive notice assumes that the person has been notified, whether they know it or not. Notification doesn't necessarily mean that this person has been specifically notified, only that this information is available to the public.

The memorandum and articles, when registered, become public documents and can be inspected by anyone on payment of nominal fee. Therefore, every person who contemplates entering into a contract with a company has the means of ascertaining

and is consequently presumed to know, not only the exact powers of the company but also the extent to which these powers have been delegated to the directors, and of any limitations placed upon the exercise of these powers. In other words, every person dealing with the company is deemed to have a “constructive notice” of the contents of its memorandum and articles. Consequently, if a person enters into a contract which is beyond the powers of the company, as defined in the memorandum, or outside the limits set on the authority of the directors, he cannot, as a general rule, acquire any rights under the contract against the company.

Outsiders dealing with incorporated bodies are bound to take notice of limits imposed on the corporation by the memorandum or other documents of constitution. Nevertheless they are entitled to assume that the directors or other persons exercising authority on behalf of the company are doing so in accordance with the internal regulations as set out in the Memorandum & Articles of Association.

Answer 1(iii)

Unlike the provisions of Section 166, which require the Annual General Meeting of the company to be held at the registered office of the company during the working hours and on a day that is not a public holiday, there are no such restrictions in the Act regarding the meeting of the Board of directors. The meetings of the Board of directors may, therefore, be held at any place convenient to the Directors outside the business hours and even on a public holiday unless the articles provide otherwise.

It has to be noted that there is no restriction regarding the holding of Board meetings on any day, even if it be public holiday unless the articles provide otherwise. But if, for want of quorum, a Board meeting has to be adjourned to the same day next week as required by Sub-section (1) and if that day happens to be a public holiday, the adjourned meeting should be held on the next day succeeding the holiday or if that is a public holiday, till the next succeeding day which is not a public holiday at the same time and place. The Department has clarified in connection with Section 285 that it would not raise any objection if an adjourned Board meeting is held on ‘a public holiday, for the convenience of the directors although it considers that an original meeting should also normally be held only on working day. [(Letter No 8/11 (285) 63-PR dated 2-1-1963].

Answer 1(iv)

Dividend cannot be paid out of capital, even if the articles of association authorise such payment. As per Section 205, dividend may be paid out of the following three sources only:

- out of current profits;
- out of profits for any previous financial year or years; and
- out of moneys provided by the Central or State Government for the payment of dividend.

Directors who knowingly paid dividends out of capital shall be held personally liable to make good the amount to the company. When a misrepresentation was made to the shareholders by the directors that the dividends were being paid out of profits while they were actually paid out of capital, the shareholders would not be accountable and the

directors alone would be accountable to the company [*Oxford Benefit Building & Investment Society, In re* (1886) 35 Ch. D].

However, interest may be paid out of capital, on the shares of the company, with the previous approval of the Central Government under Section 208.

Answer 1(v)

Rule 3 of Companies (Director Identification Number) Rules, 2006, provides that every individual, who is an existing director or intending to be appointed as director of a company shall apply for allotment of DIN.

Company is defined under section 3 of the Companies Act, 1956 means a company formed and registered under this Act or existing company.

Therefore, DIN Rules are not applicable to directors of foreign company. So, it is not mandatory for directors of foreign company having branch office in India to get Director Identification Number.

Question 2

- (a) Write the most appropriate answer from the given options in respect of the following :
- (i) The privilege of doing business under the corporate form of organisation is —
 - (a) Limited liability for business debt
 - (b) Unlimited liability for business debt
 - (c) No liability for business debt
 - (d) None of the above.
 - (ii) The question of provisional contract does not arise as the company commences business immediately on its incorporation in case of —
 - (a) A public company
 - (b) A private company
 - (c) Both (a) and (b)
 - (d) None of the above.
 - (iii) The money paid by the subscribers must be returned forthwith, if the minimum subscription is not raised within —
 - (a) 30 Days after the issue of the prospectus
 - (b) 60 Days after the issue of the prospectus
 - (c) 120 Days after the issue of the prospectus
 - (d) 180 Days after the issue of the prospectus.
 - (iv) In the absence of a valid nomination, on the death of a sole owner of shares, the rights and liabilities go in favour of the —
 - (a) Company
 - (b) Government

- (c) Registrar of Companies
 - (d) Legal heirs.
 - (v) Appointment of an alternate director is the prerogative of the —
 - (a) Board of directors
 - (b) Shareholders
 - (c) Government
 - (d) None of the above.
 - (vi) Section 226 containing provisions about qualifications and disqualifications of auditors is applicable to —
 - (a) Public companies
 - (b) Private companies
 - (c) Section 25 companies
 - (d) All companies.
 - (vii) According to section 294, no company shall appoint a sole selling agent for any area for a term exceeding —
 - (a) 2 Years
 - (b) 3 Years
 - (c) 5 Years
 - (d) None of the above.
 - (viii) Which of the following court is empowered to supervise the implementation of the scheme of compromise and arrangement under section 392 —
 - (a) Supreme Court
 - (b) High Court
 - (c) Sessions Court
 - (d) None of the above.
- (1 mark each)
- (b) Re-write the following sentences after filling-in the blank spaces with appropriate word(s)/figure(s) :
- (i) A company being a legal entity must have a _____ of its own to establish its separate identity.
 - (ii) _____ means a prospectus issued by any financial institution or bank for one or more issues of securities or class of securities specified in the prospectus.
 - (iii) Where a company borrows without the authority conferred on it by its articles or beyond the amount set-out in the articles, it is an _____ borrowing.
 - (iv) A _____ is a security given for securing loans or debentures by way of a mortgage on the assets of the company.
 - (v) The Depositories Act, 1996 specifies that all _____ held in a depository are fungible.

- (vi) *A director can act for _____ months without possessing the qualification shares.*
- (vii) *For any public deposit matured and claimed but remaining unpaid, the company should pay a penal interest of _____ per annum for overdue period.*
- (viii) _____ *means the profits which the law allows the company to distribute by way of dividend.* (1 mark each)

Answer 2(a)(i)

- (a) Limited liability for business debt.

Answer 2(a)(ii)

- (b) A private company.

Answer 2(a)(iii)

- (c) 120 days after the issue of the prospectus.

Answer 2(a)(iv)

- (d) Legal heirs.

Answer 2(a)(v)

- (a) Board of Directors

Answer 2(a)(vi)

- (d) All companies.

Answer 2(a)(vii)

- (c) 5 years.

Answer 2(a)(viii)

- (b) High Court.

Answer 2(b)

- (i) A company being a legal entity must have a **name** of its own to establish its separate identity.
- (ii) **Shelf Prospectus** means a prospectus issued by any financial institution or bank for one or more issues of securities or class of securities specified in the prospectus.
- (iii) Where a company borrows without the authority conferred on it by its articles or beyond the amount set-out in the articles, it is an **ultra-vires** borrowing.
- (iv) A **charge** is a security given for securing loans or debentures by way of a mortgage on the assets of the company.
- (v) The Depositories Act, 1996 specifies that all **securities** held in a depository are fungible.

- (vi) A director can act for **two** months without possessing the qualification shares.
- (vii) For any public deposit matured and claimed but remaining unpaid, the company should pay a penal interest of **18%** per annum for overdue period.
- (viii) **Divisible profits** means the profits which the law allows the company to distribute by way of dividend.

Question 3

Write notes on any four of the following :

- (i) *Conclusive evidence*
- (ii) *True and fair view*
- (iii) *Digital signature*
- (iv) *Essentials of a mortgage*
- (v) *Divisible profits*
- (vi) *Independent director.*

(4 marks each)

Answer 3(i)**Conclusive evidence**

According to Section 35 of the Act, a Certificate of Incorporation given by the Registrar in respect of any association shall be conclusive evidence that all the requirements of the Act have been complied with in respect of registration and matters precedent and incidental thereto, and that the association is a company authorised to be registered and duly registered under the Act. The Certificate of Incorporation is conclusive evidence that everything is in order as regards registration and that the company has come into existence from the earliest moment of the day of incorporation stated therein with rights and liabilities of a natural person, competent to enter into contracts [*Jubilee Cotton Mills Ltd. v. Lewis*, (1924) (A.C. 958)]. The validity of the registration cannot be questioned after the issue of the certificate.

Answer 3(ii)**True and fair view**

The annual accounts of the company should not only be made in the prescribed format and in accordance with the requirements of the law but should also give the true and fair view of the affairs and working of the company. Every information which is considered relevant and necessary should be disclosed even if it is not specifically required by the law to be shown. The information should be given unambiguously; in clear and precise terms and should be according to the commonly accepted accounting policies.

The auditor in his report under section 227(2) of the Companies Act, 1956 is required to state as to whether in his opinion and to the best of his information, the accounts of the company give a true and fair view of the affairs of the company.

Answer 3(iii)**Digital Signature**

The Information Technology Act, 2000 provides for use of Digital Signatures on the documents submitted in electronic form in order to ensure the security and authenticity of the documents filed electronically. This is the only secure and authentic way that a document can be submitted electronically. As such, all filings done by the companies under MCA21 e-Governance programme are required to be filed with the use of Digital Signatures by the person authorised to sign the documents.

Section 2(p) of the Information Technology Act, 2000 defines the term "digital signature" to mean authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions specified.

One can use only the valid Digital Signatures issued to the person. It is illegal to use Digital Signatures of anybody other than the one to whom it is issued.

Answer 3(iv)**Essentials of a Mortgage**

1. *Transfer of Interest*: The first thing to note is that a mortgage is a transfer of interest in the specific immovable property. The mortgagor as an owner of the property possesses all the interests in it, and when he mortgages the property to secure a loan, he only parts with a part of the interest in that property in favour of the mortgagee. After mortgage, the interest of the mortgagor is reduced by the interest which has been transferred to the mortgagee. His ownership has become less for the time being by the interest which he has parted with in favour of the mortgagee. If the mortgagor transfers this property, the transferee gets it subject to the right of the mortgagee to recover from it what is due to him i.e., the principal plus interest.
2. *Specific Immovable Property*: The second point is that the property must be specifically mentioned in the mortgage deed. Where, for instance, the mortgagor stated "all of my property" in the mortgage deed, it was held by the Court that this was not a mortgage. The reason why the immovable property must be distinctly and specifically mentioned in the mortgage deed is that, in case the mortgagor fails to repay the loan the Court is in a position to grant a decree for the sale of any particular property on a suit by the mortgagee.
3. *To Secure the Payment of a Loan*: Another characteristic of a mortgage is that the transaction is for the purpose of securing the payment of a loan or the performance of an obligation which may give rise to pecuniary liability. It may be for the purpose of obtaining a loan, or if a loan has already been granted to secure the repayment of such loan. There is thus a debt and the relationship between the mortgagor and the mortgagee is that of debtor and creditor. When A borrows 100 bags of paddy from B on a mortgage and agrees to return an equal quantity of paddy and a further quantity by way of interest, it is a mortgage transaction for the performance of an obligation.

There are three outstanding characteristics of a mortgage:

- (a) The mortgagee's interest in the property mortgaged terminates upon the performance of the obligation secured by the mortgage.
- (b) The mortgagee has a right of foreclosure upon the mortgagor's failure to perform.
- (c) The mortgagor has a right to redeem or regain the property on repayment of the debt or performance of the obligation.

Answer 3(v)

'Divisible profits' means the profits which the law allows the company to distribute to the shareholders by way of dividend. According to Palmer's Company Law, the terms 'divisible profits' and 'profits in the legal sense' are synonymous. The profits of a business mean the net proceeds of the concern after deducting the necessary outgoings without which those proceeds could not be earned. [*Bharat Insurance Co. Ltd. v. CIT* (1931) 1 Com. Cases 192, 196 (Lah)]. 'Profits available for dividend' has been held to mean the profits which the directors consider should be distributed after making provision for depreciation or past losses, for reserves or for other purposes.

Answer 3(vi)

Independent Director

Clause 49 of the listing agreement defines independent directors as follows: "For the purpose of this clause the expression 'independent directors' shall mean a non-executive director of the company who:

- (a) apart from receiving director's remuneration, does not have any material pecuniary relationships or transactions with the company, its promoters, its directors, its senior management or its holding company, its subsidiaries and associates which may affect independence of the director;
- (b) is not related to promoters or persons occupying management positions at the board level or at one level below the board;
- (c) has not been an executive of the company in the immediately preceding three financial years;
- (d) is not a partner or an executive or was not partner or an executive during the preceding three years, of any of the following:
 - (i) the statutory audit firm or the internal audit firm that is associated with the company, and
 - (ii) the legal firm(s) and consulting firm(s) that have a material association with the company.
- (e) is not a material supplier, service provider or customer or a lessor or lessee of the company, which may affect independence of the director.
- (f) is not a substantial shareholder of the company i.e. owning two percent or more of the block of voting shares.
- (g) is not less than 21 years of age.

Question 4

- (a) Define 'oppression and mismanagement'. What are the powers of the Government of India to prevent oppression and mismanagement ? (8 marks)
- (b) What are the objects of Multi-State Cooperative Society ? (8 marks)

Answer 4(a)

The words 'oppression and mismanagement' are not defined in the Act. The word oppression has been explained in a case by the Supreme Court as –

"the essence of the matter seem to be that the conduct complained of should at the lowest, involve a visible departure from the standards for fair dealing, on which every shareholder who entrusts his money to the company is entitled to rely."

The term mismanagement means any act on the part of management which is regarded as injury to the interest of the company or public interest.

"Oppression must be a continuous process. This is suggested by the words, 'are being conducted in a manner...' used in Section 397. Hence isolated acts of oppression or mismanagement will not give rise to an action under Section 397 of the Act.

Powers of the Central Government to prevent Oppression or Mismanagement

1. The Central Government may appoint such number of persons specified in writing to hold office as directors thereof as is necessary to effectively safeguard the interests of the company, its shareholders or the public interest, for such period, not exceeding 3 years on any one occasion as it may think fit, if the Tribunal¹ considers it necessary [Section 408(10)], where—
 - (i) not less than 100 members of the company or of the members holding not less than 1/10th of the total voting power therein apply to the Company Law Board in the matter [Section 408(1)]; and
 - (ii) on receipt of such application or on a reference made to it by the Central Government make such inquiry as it deems fit to make [Section 408(1)] and found necessary to such appointment.
2. But instead of passing such an order, the Tribunal¹ may direct the company to amend its articles to provide for a proportional representation (according to Section 265) for appointment of directors to protect minority interests.
3. In case the Tribunal¹ passes an order for amendment of a company's articles and to make fresh appointment of directors in accordance with it, it may direct that until new directors are appointed in pursuance of the Government's order such number of persons of the company specified by the Tribunal¹ shall hold office as additional directors, the Central Government shall appoint such additional directors [Section 408(2)].
4. Any directors appointed by the Central Government shall not be liable to retirement by rotation.

¹ In place of CLB vide Companies (Second Amendment) Act, 2002.

5. A person appointed under Sub-section (1) to hold office as a director or a person directed under Sub-section (2) to hold office as an additional director, shall not be required to hold any qualification shares nor his period of office shall be liable to determination by retirement of directors by rotation; but any such director or additional director may be removed by the Central Government from his office at any time and another person may be appointed by the Government in his place to hold office as director or as, the case may be, an additional director [Section 408(4)].
6. No change in the Board of directors made after a person is appointed or directed to hold office as a director or additional or under Section 408 shall, so long as such director or additional director holds office, have effect unless confirmed by the Tribunal¹ [Section 408(5)].
7. Notwithstanding anything contained in this Act or in any other law, where any person is appointed by Central Government to hold office as director or additional director of a company in pursuance of Sub-section (1) or Sub-section (2) of Section 408, the Central Government may issue such directions to the company as it may consider necessary or appropriate in regard to its affairs. Such directions may include directions to remove an auditor already appointed and to appoint another auditor in his place or to alter the articles of the company and upon such directions being given, the appointment, removal or alteration as the case may be, shall be deemed to have come into effect as if the provisions of this Act in this behalf have been complied with without requiring any further act or thing to be done [Section 408(6)].
8. The Central Government may require the persons appointed as directors or additional directors to report to the Government from time to time with regard to the affairs of the company.

Answer 4(b)**Objects of Multi-State Co-operative Societies**

A Multi-State Co-operative Society is registered under this Act to serve the interest of the members in more than one State with the object to promote the economic and social betterment of its members through mutual aid and in accordance with the Co-operative principles, such as —

- (1) Membership is voluntary and open without any social, political or religion discrimination to all persons, utilising its services.
- (2) All members, institutional or individual, enjoy equal right of voting i.e. one member one vote.
- (3) Surplus of savings, if any, arising from the operations of the society belongs to the society as a whole and no individual member has a claim to the surplus.
- (4) Surplus should be utilised for:
 - (a) Providing for development of the business of the society;
 - (b) Providing services for the common enjoyment of members;

- (c) Distribution among the members in proportion to their transactions with the society.
- (5) Actively co-operate with other Co-operative Societies at local, national or international levels.
- (6) Undertake education of its members, office bearers and employees and the general public regarding the principles and practice of co-operation.
- (7) The share capital of Societies shall receive strictly limited rate of interest (i.e. to say dividend).
- (8) Administration is based on democratically expressed will of the members.
- (9) The management of the society is accountable to its own members.

The Multi-State Co-operative Societies may also be formed with the object of facilitating the operations of other such Societies or of Co-operative Societies or of both.

Question 5

- (a) *The managing director of a public limited company applied for purchasing a company's flat. The price of the flat is ₹ 40 lakh. The managing director suggested that he may be allowed to pay ₹ 20 lakh and the balance of ₹20 lakh may be recovered from his salary in 40 installments. Accounts department observed that it will tantamount to providing house building advance to the managing director which is not covered by the rules of the company. Being the Company Secretary of the company, you have been asked by the Board of directors to examine and submit a note stating the rules in this regard and action to be taken for considering the request.*
(8 marks)
- (b) *Can an insurance company commence business immediately after getting registered under the Companies Act, 1956 and obtaining certificate of commencement of business ? If not, what are the formalities required to be fulfilled before commencing business ?*
(8 marks)

Answer 5(a)

Note on request of the Managing Director for purchase of a company flat

Mr. M, Managing Director has applied for purchasing a company flat. The price of flat is ₹ 40 lakh. The Managing Director has requested that he will pay ₹ 20 lakh as initial payment and the balance of ₹ 20 lakh may be recovered from his remuneration @ ₹ 50,000/- per month for 40 months.

The company has no scheme for payment of House building advance to its employees. The Bombay High Court in *Fridie Ardeshir Mehta (Dr.) v. Union of India* (1991) 70 Comp. Cas. 210 (1991) 1 Comp. LJ 437 (Bom.) came to the conclusion that the company selling one of its flats to one of its directors on receiving half the price in cash and agreeing to accept the balance in instalments does not amount to giving of loan to the director.

In view of the above, the view of the observation of Accounts Department is not correct that such purchasing of company's flat by managing director would tantamount to providing house building advance to managing director.

As such Board may like to agree with the request of Managing Director.

Submitted.

ABC

Company Secretary

Answer 5(b)

Insurance Company (insurer) after getting registered under the Companies Act, 1956 and obtaining certificate of commencement of business is also required to fulfill certain formalities as provided under the Insurance Act, 1938. These are as under:

- Insurer shall not be registered by a name identical with that by which a company in existence is already registered, or so nearly resembling that name as to be calculated to deceive except when the insurer inexistence is in the course of being dissolved and signifies his consent to the Authority.
- No insurer carrying on the business of life insurance, general insurance or re-insurance in India on or after the commencement of the Insurance Regulatory and Development Authority Act, 1999, shall be registered unless it has, -
 - (i) a paid-up equity capital of rupees one hundred crores, incase of a person carrying on the business of life insurance or general insurance; or
 - (ii) a paid-up equity capital of rupees two hundred crores, in case of a person carrying on exclusively the business as are insurer.

Provided that in determining the paid-up equity capital specified under clause (i) or clause (ii), the deposit to be made and any preliminary expenses incurred in the formation and registration of the company shall be excluded.

- The insurance company is required to obtain from the Insurance Regulatory and Development Authority a certificate of registration for the particular class of insurance business.

Every application for registration shall be made in such manner as may be determined by the regulations made by the Authority and shall be accompanied by -

- (a) a certified copy of the memorandum and articles of association, where the applicant is a company and incorporated under the Indian Companies Act, 1956;
- (b) the name, address and the occupation, if any, of the directors where the insurer is a company incorporated under the Indian Companies Act, 1956;
- (c) a statement of the class or classes of insurance business done or to be done, and a statement that the amount required to be deposited under the provisions before application for registration is made has been deposited together with a certificate from the Reserve Bank of India showing the amount deposited;
- (d) in the case of an insurer having his principal place of business or domicile

outside India, a statement verified by an affidavit made by the principal officer of the insurer setting forth the requirements (if any) not applicable to nationals of the country in which such insurer is constituted, incorporated or domiciled which are imposed by the laws or practice of that country upon Indian nationals as a condition of carrying on insurance business in that country;

- (e) a certified copy of the published prospectus, if any, and of the standard policy forms of the insurer and statements of the assured rates, advantages, terms and conditions to be offered in connection with insurance policies together with a certificate in connection with life insurance business by an actuary that such rates, advantages, terms and conditions are workable and sound;

Provided that in the case of marine accident and miscellaneous insurance business other than workmen's compensation and motorcar insurance the above requirements regarding prospectus, forms and statements shall be complied with only in so far as the prospectus, forms and statements may be available;

- (f) the receipt showing payment of fee as may be determined by the regulations which shall not exceed fifty thousand rupees for each class of business as may be specified by the regulations made by the Authority;
- (g) such other documents as may be specified by the regulations made by the Authority.

Question 6

- (a) *Well-done Ltd. wants to make a first call of ₹ 30 on equity share of nominal value of ₹ 100 each on 16th October, 2011. Can it do so ? Further, if the company proposes to make second call on 7th November, 2011, will it be permitted to do so ?* (4 marks)
- (b) *The chairman and managing director of Progressive Ltd. resigned on 6th May, 2009 as such, but the company filed Form No.32 with the Registrar of Companies stating the date of resignation as 15th March, 2010. The company issued various cheques to its investors in repayment of their deposits after 6th May, 2009 which were bounced. The investors filed a complaint against the former chairman and managing director. The articles of association of the company provided that the resignation would be effective from the date it was tendered. Will the chairman and managing director be liable in the instant case ?* (4 marks)
- (c) *A registered office was shifted from one State to another. A labour litigation was pending before the court. So, the employees objected to transfer. Whether the objection of the employees is sustainable ?* (4 marks)
- (d) *Accounting year of Devdatta Ltd. ends on 30th June, 2009. It is required to hold an annual general meeting by 31st December, 2009. Due to some reason, the annual general meeting could not be held in December, 2009. On an application, the Registrar of Companies granted permission to hold the meeting in February, 2010. The annual general meeting was duly held in February, 2010.*

Has the company complied with the requirements of holding annual general

meeting every year ? Will it amount to contravention of the provisions of section 166 ? (4 marks)

Answer 6(a)

Proviso to Regulation 13(1) to the Table 'A' of the Companies Act provides that no call shall exceed 25% of the nominal value of the share or be payable at less than one month from the date fixed for the payment of the last proceeding call.

In the given case, the proposed first call is exceeding the limit of 25% of nominal value of share. Therefore, the company will not be permitted to do so. Further, the second call is proposed to be payable at less than one month from the first call. So, it is also not permitted.

Answer 6(b)

The chairman and managing director of Progressive Limited could not be held responsible under s.141 of the Negotiable Instruments Act 1881 as he had resigned from his directorship on 6th May 2009 and the cheques issued after 6th May 2009 which were bounced.

In *Dushyant D. Anjaria v. Wall Street Finance Ltd.* (2001) Comp. Cas. 655 (Bom.), the Bombay High Court had held that the resignation of a Director would be effective from the date it was submitted because the letter brings out clearly his intentions to resign. However, if there was delay on the part of the company in intimating the ROC about the date of the resignation, the resigning Director could not be saddled with responsibility and liability for such delay.

Date of filing of Form 32 is not conclusive as to date of resignation of director - date shown in the letter of resignation is to be used. *Pandurang Camotim Sancoaltar v. Suresh Prabhakar Prabhu* 48 SCL 437, 53 CLA 265.

Articles of association of the company also provided that the resignation would be effective from the date it was tendered.

In *Glossop v. Glossop* (1907) Ch. D. 370, it was held that the resignation of a director would become effective on and from the date it was tendered and from the Articles of Association of the Company, it would be clear that resignation of a Director would be effective from the date it was tendered.

Answer 6(c)

In *Bharat Commerce and Industries Ltd. In re*, (1973) 43 Com Cas 162, it was held that employees' union which is a registered body and which represents quite a number of the employees employed at the registered office of the company, has the right to appear and to oppose this application on the ground that their interests would be likely to be prejudicially affected if such special resolution would be confirmed by this court. It is always open to the employees concerned to bring it to the notice of the court through their union or even individually, if the company in passing such resolution did not act *bona fide* so as to enable the court to examine the reasons set out in the petition to consider whether it would be just and equitable to confirm such a resolution.

Therefore, the objection of the employees is sustainable.

Answer 6(d)

In the given case, accounting year of the company ends on 30th June, 2009. As per section 166, it is required to hold the Annual General Meeting latest by the 31st December, 2009. If for any reason, the Annual General Meeting cannot be held in December, 2009, and if on an application, the Registrar grants time to hold the meeting in February, 2010, the company by holding the Annual General Meeting in February, 2010, is not complying with the requirements of holding an Annual General Meeting every year. Still, it will not be said to have contravened the provisions of section 166.

Vide, Letter No. 34/11/69-CL-III, dated 13-1-1972, the question whether the second proviso to sub-section (1) of section 166 empowers the Registrar of Companies to grant extension not exceeding three months, though the company concerned may not be able to hold its annual general meeting in a particular calendar year, has been considered by the Company Law Board.

The Board (now the Central Government) is of the view that the power of the Registrar conferred by the second proviso of the aforesaid section of the Act enabling him to grant extension of time to hold the annual general meeting is exercisable by the Registrar of Companies without restriction or qualification up to a limit of three months. He can, therefore, grant extension of time for special reasons up to the maximum limit of three months, even if such extension allows the company to hold its general meeting beyond the calendar year.

Question 7

State, with reasons in brief, whether the following statements are true or false:

- (i) An incorporated company never dies except when it is wound-up as per law.*
- (ii) An auditor of a government company is appointed by the Central Government on the advice of Comptroller and Auditor General of India.*
- (iii) A company has a statutory right to alter its articles of association.*
- (iv) A public company can be converted into a private company without the approval of the Central Government.*
- (v) A company may create a mortgage or a charge, including a floating charge, on any of its book-debts.*
- (vi) The power to make calls is exercised by the shareholders in their meetings by means of a resolution.*
- (vii) Shares of a company can be a subject matter of a valid pledge.*
- (viii) The Companies Act, 1956 lays down certain qualifications for a person to be appointed as a director of a company.*

(2 marks each)

Answer 7(a)

- (i) True.** As stated in Section 34(2) of the Companies Act, an incorporated company has perpetual succession. The company shall continue to exist indefinitely till it

is wound-up in accordance with the provisions of the Companies Act. “Members may come and members may go but the company can go on forever”.

- (ii) **False.** Section 619(2) of the Companies Act, 1956 provides that the auditor of a Government company shall be appointed or re-appointed by the Comptroller and Auditor-General of India.
- (iii) **True.** A company has a statutory right to alter its articles of association. But the power to alter is subject to the provisions of the Act and to the conditions contained in the memorandum. Section 31 provides that subject to the provisions of the Act and the conditions contained in its memorandum, a company may, by special resolution, alter its articles, and adds that any alteration so made shall be as valid as if originally contained in the articles.
- (iv) **False.** An alteration of articles to effect a conversion of a public company into a private company cannot be made without the approval of the Central Government [Section 31].
- (v) **True.** In accordance with provisions of section 125(4)(d), a company may create a mortgage or a charge including a floating charge, on any of its book-debts.
- (vi) **False.** The power to make calls is exercised by the Board in its meeting by means of a resolution and in accordance with the articles of the company.
- (vii) **True.** Shares of a company can be a subject matter of a valid pledge. Section 2(7) of Indian Contract Act defines the term ‘goods’ as meaning every kind of moveable property other than actionable claim and money and includes stocks and shares. Shares are goods under the Indian Contract Act and can be a subject matter of pledge.
- (viii) **False.** The Companies Act, 1956 does not lay down any qualifications for a person to be appointed as a director of a company. However, it mentions disqualifications of directors, which are contained in Section 274 of the Act.

Question 8

- (a) *“The objective of introduction of secretarial standards by the ICSI is to integrate, harmonise and standardise the diverse practices for good governance.” Explain. (6 marks)*
- (b) *Who may petition for winding-up of a company ? What are the procedures for winding-up of unregistered company ? (6 marks)*
- (c) *Discuss the term ‘profit and loss account’ of a company. What are the matters to be disclosed in the profit and loss account ? (4 marks)*

Answer 8(a)

The ultimate goal of Secretarial Standards Board issued by the ICSI is to promote good corporate practice leading to better corporate governance. The Standards are for good practices and desirable corporate governance with a view to ensuring full play of shareholders democracy and utmost transparency, integrity and fair play, going beyond the minimum requirements of law. The adoption of Secretarial Standards will have a

substantial impact on the improvement of quality of secretarial practices being followed by companies.

Companies follow diverse secretarial practices and, therefore, there is a need to integrate, harmonise and standardize such practices so as to promote uniformity and consistency

By following the Secretarial Standards in letter and spirit companies will be able to ensure adoption of uniform, consistent and best secretarial practices with corporate sector. Such uniformity of best practices, consistently applied will result in furthering the shareholders' democracy by laying down principles for better corporate disclosures thus adding value to the general endeavour to strive for good governance.

Ten Secretarial Standards issued so far are secretarial standard on Meetings of the Board of Directors (SS-1), General Meetings (SS-2), Dividend (SS-3), Registers and Records (SS-4), Minutes (SS-5), Transmission of Shares and Debentures (SS-6), Passing Resolutions by Circulation (SS-7), Affixing of Common Seal (SS-8), Forfeiture of Shares (SS-9), Board's Report (SS-10)

Answer 8(b)

- (1) An application for the winding up of a company has to be made by way of petition to the Court. A petition may be presented under Section 439 by any of the following persons:
 - (a) the company; or
 - (b) any creditor or creditors, including any contingent or prospective creditor or creditors; or
 - (c) any contributory or contributories; or
 - (d) all or any of the parties specified above in clauses (a), (b), (c) whether together or separately; or
 - (e) the Registrar; or
 - (f) any person authorised by the Central Government in the case falling under Section 243, i.e., following upon a report of inspectors;
 - (g) by the Central government or state Govt., in a case falling under clause (h) of Section 433;*
- (2) Section 582 of the Act specifies "unregistered companies", which may be wound up by the order of the Court under the provisions of Part X of the Act. No unregistered company shall be wound-up under this Act voluntarily by the Tribunal.
- (3) The circumstances in which an unregistered company may be wound-up are as follows:—
 - (a) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs;
 - (b) if the company is unable to pay its debts;
 - (c) if the Tribunal is of opinion that it is just and equitable that the company should be wound-up.

- (4) An unregistered company shall, for the purposes of this Act, be deemed to be unable to pay its debts—
- (a) if a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding five hundred rupees then due, has served on the company, by leaving at its principal place of business, or by delivering to the secretary, or some director, manager or principal officer of the company, or by otherwise serving in such manner as the Tribunal may approve or direct, a demand under his hand requiring the company to pay the sum so due, and the company has, for three weeks after the service of the demand, neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor;
 - (b) if any suit or other legal proceeding has been instituted against any member for any debt or demand due, or claimed to be due, from the company, or from him in his character of member, and notice in writing of the institution of the suit or other legal proceeding having been served on the company by leaving the same at its principal place of business or by delivering it to the secretary, or some director, manager or principal officer of the company or by otherwise serving the same in such manner as the Tribunal may approve or direct, the company has not, within ten days after service of the notice,—
 - (i) paid, secured or compounded for the debt or demand; or
 - (ii) procured the suit or other legal proceeding to be stayed; or
 - (iii) indemnified the defendant to his satisfaction against the suit or other legal proceeding, and against all costs, damages and expenses to be incurred by him by reason of the same;
 - (c) if execution or other process issued on a decree or order of any Court or Tribunal in favour of a creditor against the company, or any member thereof as such, or any person authorised to be sued as nominal defendant on behalf of the company, is returned unsatisfied in whole or in part;
 - (d) if it is otherwise proved to the satisfaction of the Tribunal that the company is unable to pay its debts.

Answer 8(c)

Every profit and loss account of a company shall give a true and fair view of the profit or loss of the company for the financial year and shall, subject as aforesaid, comply with the requirements of Part II of Schedule VI, so far as they are applicable thereto.

As per section 216 of the Companies Act, 1956, the profit and loss account shall be annexed to the balance sheet.

The profit and loss account –

- (a) shall be made out as clearly to disclose the result of the working of the company during the period covered by the account; and
- (b) shall disclose every material feature, including credits or receipts and debits or expenses in respect of non-recurring transactions or transactions of an exceptional nature.

The profit and loss account shall disclose the following information in respect of the period covered by the account:

- (i) (a) The turnover, that is, the aggregate amount for which sales are effected by the company, giving the amount of sales in respect of each class of goods dealt with by the company, and indicating the quantities of such sales for each class separately.
 - (b) Commission paid to sole selling agents within the meaning of section 294 of the Act.
 - (c) Commission paid to other selling agents.
 - (d) Brokerage and discount on sales, other than the usual trade discount.
 - (ii) The amount provided for depreciation, renewals or diminution in value of fixed assets.
 - (iii) The amount of interest on the company's debentures and other fixed loans.
 - (iv) The amount of charge for Indian income-tax and other Indian taxation on profits, including, where practicable, with Indian income-tax any taxation imposed elsewhere to the extent of the relief, if any, from Indian income-tax and distinguishing, where practicable, between income-tax and other taxation.
 - (v) The amounts reserved for -
 - (a) repayment of share capital; and
 - (b) repayment of loans.
 - (vi) (a) The aggregate, if material, of any amounts set aside or proposed to be set aside, to reserves, but not including provisions made to meet any specific liability, contingency or commitment known to exist at the date as at which the balance sheet is made up.
 - (b) The aggregate, if material, of any amounts withdrawn from such reserves.
 - (vii) (a) The aggregate, if material, of the amounts set aside to provisions made for meeting specific liabilities, contingencies or commitments.
 - (b) The aggregate, if material, of the amounts withdrawn from such provisions, as on longer required.
 - (viii) (a) The amount of income from investments, distinguishing between trade investments and other investments.
 - (b) Other income by way of interest, specifying the nature of the income.
 - (c) The amount of income-tax deducted if the gross income is stated under sub-paragraphs (a) and (b) above.
 - (ix) Amount, if material, by which any items shown in the profit and loss account are affected by any change in the basis of accounting.
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