

COMPANY SECRETARIAL PRACTICE

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.

1.Draft **any four** of the following. In case of resolution, give reasons for passing the requisite resolution stating the authority who can pass it and also the type of resolution referring to the relevant section(s) of the Companies Act, 1956 :

(i)Agreement with Vivek as the Managing Director of Grow Fast Ltd. for a period of 3 years at a remuneration of Rs.20 lakh per month with perquisites allowable under Schedule XIII to the Companies Act, 1956, but with no commission. The company is consistently earning profits and the remuneration will be subject to the provisions of sections 198 and 309. (Only main body of the resolution is to be drafted containing the duties, responsibilities and powers of the appointee.)

(ii)Appropriate resolution to make investment of Rs.15 crore in preference shares of Sona Tractors Ltd., a company in trade dealing relationship with the investing company. The investing company has a paid-up equity capital of Rs.20 crore, a paid-up preference capital of Rs.5 crore and general reserve of Rs.4 crore. The company has no other investment or recoverable loan.

(iii)Resolution recommending declaration of dividend to shareholders without providing for depreciation.

(iv)Notice for book closure prior to payment of final dividend.

(v)A compliance certificate without any qualification for a private limited company having a paid-up capital of Rs.2 crore in respect of the year ended on 31st March, 2009 embodying the substantive part of the report (i.e., the task carried on and scope of the work) including only certification of maintenance of books and registers and filing of required returns/documents with appropriate authorities. (5 marks each)

Answer 1(i)

Authority : Shareholders

Type of Resolution : Ordinary resolution

Resolved that pursuant to Schedule XIII to the Companies Act, 1956 and subject to the provisions of section 198 and 309 of the Companies Act, 1956, the company be and is hereby appoint Sri M L Annadurai, resident of.....and aged 54 years as its managing director for a period of 3 years commencing from.....and Sri M L Annadurai agrees to act as the managing director (M.D.) of the company for the said duration on the following terms and conditions:

(a)The MD shall work under the superintendence, control and direction of the Company's Board, shall have the powers of general conduct and management of business and affairs of the company in relation to the following function, namely (a)(b).....(c)except in the matters which may be specifically required to be done by the Board either by the governing law or by the articles of the

company.

(b) The MD will exercise and perform such acts and duties as the Board may from time to time delegate to him. He will also do and perform all other acts, deeds and things which in the ordinary course of business, he may consider necessary, proper and in the interest of the company.

(c) Without restricting the general powers and authority as mentioned above, the MD will have following powers to be exercised on behalf of the company–

- (i).....
- (ii)
- (iii)

(d) The MD shall hold office for 3 years commencing from.....

(e) The company shall pay to the MD the remuneration specified below in consideration of services as MD:

- (i) salary at Rs.20 lakh per month inclusive of DA;
- (ii) Perquisites as allowable under Part II, Section II of Sch.XIII.

(f) In the event of the company failing to earn adequate profits or incurring loss during the tenure of the agreement, this agreement will automatically come under section II of Part II of the aforesaid schedule and the remuneration per month will be worked out based on effective capital of the company.

Note: The board of directors of a company can appoint a managing director if authorized by the articles in accordance with Schedule XIII to the Companies Act, 1956. However, according to part III of Schedule XIII, where a managing director is appointed as per Schedule XIII, the appointment shall be subject to approval by a resolution of the shareholders in general meeting. Further, as the question specifically mentions that perquisites are allowable under Schedule XIII, Central Government's approval is not required in the present case.

Answer 1(ii)

Authority : Board of Directors
Type of resolution : Board Resolution

The resolution will be a Board resolution as the proposed investment is within the limit allowed to the Board to make investments, loans etc under section 372A of the Companies Act, 1956.

The paid-up share capital is Rs.20 crore+Rs.5 crore	=	Rs.25 crore
The free reserves	=	Rs.04 crore
Total paid-up share capital and free reserves	=	Rs.29 crore

60% of Rs.29 crore	=	17.4 crore
100% of free reserve	=	4 crore

Rs.17.4 crore is accordingly the upper limit in the case and the proposed investment is Rs.15 crore.

Accordingly, the following is the draft of the Board Resolution:

Resolved unanimously that an Investment of Rs. 15 crore in Preference Shares of Sona

Tractors Ltd. as a trade investment to help that company expand its capacity to meet the company's growing demands for tractors and their components be and is hereby approved. Sri.....,the Executive Director (Finance) is authorized to sign the application form and do all such acts as are necessary or incidental thereto.

Answer 1(iii)

Authority	Board of Directors with approval of the Central Government.
Type of resolution	Board Resolution subject to approval of the Central Government.

RESOLVED THAT –

(i)an application be made to the Central Government under clause (c) of the proviso to Sub-section (1) of Section 205 of the Companies Act, 1956 to allow the company to declare and pay dividend for the financial year ending on 2008 out of the profits of the company for that year without providing for depreciation at the rate specified in Schedule XIV, which requires the depreciation on the gas cylinders including valves and regulators, to be provided at per cent.

(ii)the Company Secretary, Shri be and is hereby authorised to make the required application to the Central Government for seeking Central Government's approval to the company declaring and paying dividend for the financial year ending 2008 out of the profits of the company for that year without providing for depreciation at the specified rate.

Answer 1(iv)

NOTICE FOR BOOK CLOSURE

Name of Company:

Registered Office:

Notice

Pursuant to Section 154 of the Companies Act, 1956 and the applicable clauses of the Listing Agreement, notice is hereby given that the register of members and the share transfer register of the company will remain closed, for the purpose of payment of final dividend, from theth day of (month), 2009 to theth day of 2009 (both days inclusive).

Members of the company are requested to intimate to the company at its registered office above, their latest postal addresses, where the final dividend warrants may be sent by the company.

Place:.....

Date:.....

For Limited

(.....)

Company Secretary

Answer 1(v)

SPECIMEN COMPLIANCE CERTIFICATE

Registration No. of the Company_____

Nominal Capital: Rs. _____

To,
The Members
XYZ Limited,
163 Back Bay Reclamation
Nariman Point
Mumbai

I/We have examined the registers, records, books and papers of XYZ Limited (the Company) as required to be maintained under the Companies Act, 1956, (the Act) and the rules made thereunder and also the provisions contained in the Memorandum and Articles of Association of the Company for the financial year ended on 31st December 2009 (financial year). In my/our opinion and to the best of my/our information and according to the examinations carried out by me/us and explanations furnished to me/us by the company, its officers and agents, I/we certify that in respect of the aforesaid financial year:

1. The company has kept and maintained all registers as stated in Annexure 'A' to this certificate, as per the provisions of the Act and the rules made thereunder and all entries therein have been duly recorded.
2. The company has duly filed the forms and returns as stated in Annexure 'B' to this certificate, with the Registrar of Companies, Regional Director, Central Government, Company Law Board or other authorities within the time prescribed under the Act and the rules made thereunder.

Signature

Date:.....

Place:.....

[.....name.....]

Practising Company Secretary

Membership No. _____

Certificate of Practice No. _____

Question 2

(a) State, with reasons in brief, whether the following statements are correct or incorrect:

- (i) A listed company cannot issue sweat equity shares to its promoters.
- (ii) Since a producer company is an innovation, it does not need the words 'limited' at the end of its name.
- (iii) E-Form 10 relates to registration of charges.
- (iv) A company declared defunct under section 560 can never be included again in the register of companies maintained by the Registrar of Companies.
- (v) The Insider Trading Regulations promulgated by SEBI excludes the auditor of the company from the scope of the regulations.
- (vi) Under the UK Companies Act, 2006, a director of a public company can be removed before expiry of his term only by a special resolution. (2 marks each)

(b) Re-write the following sentences after filling-in the blank spaces with appropriate word(s)/figure(s) :

- (i)_____ is the conclusive evidence in case of a company that the statutory requirements have been complied with.
- (ii)In case the minimum subscription is not received and refund is delayed, _____% interest is to be paid by a company.
- (iii)_____ is a new form of legal entity recognised in India recently.
- (iv)Buy-back securities should be physically destroyed within _____ days. (1 mark each)

Answer 2(a)

(i)**Incorrect**

Reason: As per section 79A (1) (d) of the Companies Act, 1956, the sweat equity shares of a company whose equity shares are listed on a recognized stock exchange, are to be issued in accordance with the regulations made by the Securities and Exchange Board of India in this behalf. Under regulation 6 of SEBI (Issue of Sweat Equity) Regulations, 2002, a listed company can issue sweat equity shares to its promoters.

(ii)**Incorrect**

Reason: Section 581C of the Companies Act, 1956 mandates the use of the word 'limited' after the name of a producer company.

(iii)**Correct**

Reason: E-form 10 relates to registration of charges arising out of issue of debentures.

(iv)**Incorrect**

Reason: According to section 560(6) of the Companies Act, 1956, a company, or any member or creditors by way of an application to the Court can request for the restoration of the company's name in the register of companies before the expiry of twenty years from the date the company has been declared defunct in the Official Gazette. The Court may order for the company's name to be included again in the register of companies maintained by the Registrar of Companies.

(v)**Incorrect**

Reason: As per regulation 2(g) of the SEBI ([Prohibition of] Insider Trading) Regulations, 1992, an 'auditor' is included within the definition of 'officer of a company'.

(vi)**Incorrect**

Reason: Section 168 of the U.K. Companies Act, 2006 allows removal of a director of any company before the expiry of his term by passing an ordinary resolution.

Answer 2(b)

- (i)Certificate of Incorporation
- (ii)6%
- (iii)Limited Liability Partnership
- (iv)Seven days

Question 3

(a)Choose the most appropriate answer from the given options in respect of the following:

(i) A notice of disclosure of interest at the Board meeting is the requirement of section —

- (a) 295
- (b) 269
- (c) 297
- (d) 299.

(ii) A director appointed by the Board to hold the office until the conclusion of next annual general meeting is known as —

- (a) Additional director
- (b) Nominee director
- (c) Alternate director
- (d) Director retiring by rotation.

(iii) As per the provisions of the Companies Act, 1956, the form of proxy must be deposited with the company at least —

- (a) 24 Hours before the time of annual general meeting
- (b) 36 Hours before the time of annual general meeting
- (c) 48 Hours before the time of annual general meeting
- (d) 72 Hours before the time of annual general meeting.

(iv) The applicant for availability of name of the proposed company can have option to give maximum —

- (a) 3 Alternative names
- (b) 4 Alternative names
- (c) 5 Alternative names
- (d) 6 Alternative names.

(v) A person who is a Company Secretary and director of a company is—

- (a) Employee director
- (b) Non-executive director
- (c) Executive director
- (d) Independent director.

(vi) A company in which 50.25% of shares are held by one State government while the rest of the shares are held by private sector companies and by retail shareholders, i.e., members of public, is a—

- (a) Government company
- (b) Public company
- (c) Corporation
- (d) Private sector company.

(1 mark each)

(b) "Postal ballot system is an unmixed blessing." Comment. (6 marks)

(c) Briefly outline the provisions of the Companies Act, 1956 in regard to postal ballot. (4 marks)

Answer 3(a)

(i)(c) 299

- (ii)(a) Additional director
- (iii)(c) 48 hours
- (iv)(c) 5 alternative names
- (v)(c) Executive Director
- (vi)(b) Public company.

Answer 3(b)

Postal Ballot System is indeed a blessing as it enables members spread throughout geographically dispersed areas to cast their votes on matters of crucial interest to them e.g. issue of shares with differential voting rights, alteration of object clause of the Memorandum of Association, buy-back of shares etc. The concept of Postal Ballot is a unique provision which gives shareholders the right to vote on items of business of a corporate body without actually attending its general meetings either personally or through their proxies/representatives.

However, the postal ballot system cannot be said to be an unmixed blessing as the shareholders have no right to express their views and participate in the discussion. They can only express their assent or dissent to the proposed resolution.

Answer 3(c)

Section 192A of the Companies Act, 1956 provides for passing of resolution by postal ballot. Some of the provisions are as under:

- (i) This facility is available only to listed companies;
- (ii) Notice of the proposed resolution is to be sent to every shareholder by registered post acknowledgement due or such other mode as may be prescribed by the Central Government;
- (iii) A postage prepaid envelope shall accompany the notice to enable the shareholder to send their reply;
- (iv) A shareholder is required to send his assent or dissent to the resolution within a period of thirty days from the date of posting of letter;
- (v) Upon receiving the replies (within the stated time), the assents and dissents are counted. If the total of assents reaches the required majority, the resolution shall be deemed to be duly passed.

Question 4

(a) A charge for Rs.3 crore was created and registered by Dada Films Ltd. in favour of State Bank of India. The same was fully repaid on 31st August, 2009, but the relevant 'E-Form' for registering the satisfaction of the charge was filed on 10th October, 2009. The company then realised that it has unintentionally delayed the filing and has attracted penal provision of the Companies Act, 1956 in this regard. The company has approached Chetan, a Practising Company Secretary for his advice as regards the possibility of any condonation of the offence. What would be the advice ? (4 marks)

(b) Discuss the various aspects of 'responsibility and accountability' of the Board in corporate culture. (4 marks)

(c) Explain the impact of speculative reports in media with price sensitive information quoting case law. (4 marks)

(d)What is 'management discussion and analysis report' (MDAR) ? State its contents.
(4 marks)

Answer 4(a)

The situation given in the present case refers to satisfaction of charge. Section 138 of the Companies Act, 1956 requires that a company which has repaid its dues against which charge was created and registered with the Registrar of companies must file Form No.17 within 30 days from the date of satisfaction of charge. There is no provision for extension of time for filing of Form No.17. Any Form No.17 filed after 30 days from the date of satisfaction of charge requires order from the Company Law Board (CLB) for condoning the delay under section 141 of the Act.

In the present case, the dues were repaid on 31st August 2009. So, the company was required to file form No.17 on or before 30th September 2009. However, the company filed form No.17 on 10th October, 2009 i.e. delayed by 10 days. Therefore, the company shall have to file petition under section 141 of the Act to the CLB for condonation of delay of 10 days with relevant reasons. If the CLB passes an order for condonation of delay, the same shall be filed with the Registrar of Companies in form No.21. After approving form 21, form 17 will be approved by the ROC and then, the charge will be satisfied.

Answer 4(b)

Board of Directors is responsible for the governance of their companies and accountable for the resources entrusted to it by the shareholders. A system of good corporate governance promotes relationships of accountability between the board, the management and the auditor. It holds the management accountable to the board and the board accountable to the shareholders. The board is accountable towards the shareholders in maximizing shareholders' wealth. The Directors should not abuse their powers and further ensure that they act in the best interests of the Company in its broad sense. The responsibilities of the board include setting of company's aims, providing the leadership to put them into effect, supervising the management of the business and reporting to the shareholders on their stewardship. The board's actions are subject to laws, regulations and resolutions of the shareholders in general meetings.

The shareholders' role in governance is to appoint the directors and the auditors to satisfy themselves that an appropriate governance structure is in place.

Answer 4(c)

It was held by Appellate Authority in the case of *Hindustan Lever Ltd. vs. SEBI* (1998) 3 Comp LJ 473 (A.P.) that if leading financial newspapers had reported the possibility of a merger, it cannot be alleged later that the information about the merger was a price sensitive information. The reason is that the possibility of a merger would be presumed to be known to the public after the publication of the news of merger. As a fall out of this case, SEBI amended its Regulations in 2002 to specifically provide that speculative reports in print and electronic media shall not be considered as published information (i.e. they will be considered as unpublished price sensitive information), as provided in definition 2(k) of the amended regulations.

Answer 4(d)

A Management Discussion and Analysis Report (MDAR) is a report made by the Board of

directors of a company. The MDAR should either form a part of the Board's Report or be given as an addition thereto in the annual report to the shareholders. The MDAR should include discussions on the following matters within the limits set by the company's competitive position:

- Industry structure and developments.
- Opportunities and threats (SWOT analysis).
- Segment wise or product wise performance.
- Risks and areas of concern.
- Internal control systems and their adequacy.
- Discussion on financial performance with respect to operational performance.
- Material developments in human resources /industrial relations front, including number of people employed.

MDAR should be considered and approved by the Board in a meeting of the Board and not through resolution passed by circulation. It is desirable that MDAR is signed in the same manner as in the case of Board's report.

Question 5

As a Company Secretary of Smart Enterprises Ltd., how would you tackle the following situations:

(i) Quorum was present at the beginning of a Board meeting. However, after one hour, one director had to leave for certain emergency and the presence of directors in the meeting fell below the minimum required for quorum. There were two matters remaining to be considered as per the agenda.

(ii) A director of the company remained absent, without notice, for 6 meetings during first quarter of 2009.

(iii) The Union Bank of India has given a loan of Rs.25 crore for the company's new project and as per one of the terms of sanction it wants to nominate its Chief Manager, Vijay on the Board.

(iv) A person informs you in writing that he is not a member of your company, yet he has received a notice for the annual general meeting as a member. (4 marks each)

Answer 5(i)

As per section 287 of the Companies Act, 1956 quorum for the meeting of the Board of directors of a company shall be one-third of its total strength or two directors, whichever is higher. Also, it is necessary that the minimum quorum at the meeting should be present at all time and not only at the beginning of the meeting. It was held in the case of *Balakrishna v. Balu Subudhi* AIR 1949 Pat 184 that the quorum of the Board is required at every stage of the meeting and unless a quorum is present at every stage, the business transacted is void.

Therefore, the board is advised that the remaining businesses should not be taken up and meeting must be adjourned or terminated. The remaining subjects could be taken up in adjourned meeting or in a fresh meeting. If the remaining items are not covered by section 292, the same may also be taken up by way of resolution by circulation.

Answer 5(ii)

As per section 283(1) (g) of the Companies Act, 1956, the office of a director shall become vacant if he absents himself from three consecutive meetings of the board of directors, or from all meeting of the Board for a continuous period of three months, whichever is longer, without obtaining leave of absence from the Board. In the present case, the director remained absent from all meetings held in the first quarter of 2009, without notice i.e. without obtaining leave of absence. Therefore, he should vacate the office in terms of section 283 of the Act. Also, the company will be required to file form No.32 after his vacation from the office of the director.

Answer 5(iii)

One of the modes of appointment of a director on the board of a company is by "third party". A person so appointed is known as Nominee Director. He is not liable to retire by rotation and considered as permanent director till the pleasure of their nominating agencies. He will vacate the office automatically on liquidation of the loan or other credit facilities. However, the Articles of Association of a company must contain an Article enabling such appointment of Nominee Director.

In the given case, Union Bank could nominate its representative on the Board. However, it must be ensured that the Articles of Association of the Company contain provision for the appointment of a nominee director. Otherwise, the Articles have to be altered by passing a special resolution in the general meeting. Further, the appointment of nominee director should fall within the maximum number of directors stipulated in the Articles.

Answer 5(iv)

According to section 111(4) of the Companies Act, 1956, if the name of any person is, without sufficient cause, entered in the register of members of a company, the aggrieved person may apply to the Company Law Board for rectification of the Register.

Any entry made in the register of members, if required to be altered or removed requires approval of the Company Law Board, except any apparent clerical mistake. In the present case, a person has informed the company that he is not a member of the company. Therefore, first of all, it should be verified whether the mistake was a clerical one that would be rectified by intimating to the company. If the mistake was not a clerical one, an application to the Company Law Board is required.

Question 6

(a) There are two executive directors in your company who are technocrats. The company is a public limited company. The company has incurred huge losses in the last two years. The company wants to enhance their remuneration to Rs.6 lakh per month from existing Rs.4 lakh. The data from the balance sheet of the last year indicates that the paid-up capital of the company is Rs.10 crore and accumulated losses of Rs.10.67 crore, term loan and other long-term borrowings are Rs.5 crore. Besides, the company holds a long-term investment of Rs.7 crore. The company's remuneration committee has recommended the proposal and the company is regular in repayment of its debts. As the Company Secretary, how would you deal with the matter? (8 marks)

(b) Bring out the salient aspects of the Companies (Director Identification Number) Rules, 2006 leading to the issue of Director Identification Number (DIN). (8 marks)

Answer 6(a)

The present case deals with the payment of managerial remuneration to the whole time directors of the company. Section 198 of the Companies Act, 1956 deals with the overall remuneration payable to the managerial persons at 11% of the net profit subject to the maximum of 10% for all the directors together but not more than 5% to each such director as allowed by section 309 of the Act.

However, schedule XIII to the Companies Act, 1956 deals with situations where there are no profits or inadequate profits. It takes into consideration the concept of effective capital and fixes the maximum limit of remuneration for each director. However, there are certain conditions imposed by the said Schedule and Parts thereof. If such terms and conditions are fulfilled, the company may pay remuneration according to the provisions of Schedule XIII. In the given case the effective capital works out as under.

Paid up capital	Rs.10 crore
Secured loans	<u>Rs.05 crore</u>
Gross capital employed	Rs.15 crore
Reduced by accumulated losses	<u>Rs.10.67 crores</u>
	4.33
Further reduced by investment	7.00
Effective capital	(-)2.67 crore

Since, the effective capital is negative, as per the provisions given in Schedule XIII; the remuneration payable to each director shall be maximum Rs. 1,50,000 per month. Further, the company is required to apply to the Central Govt. for getting prior approval for the proposed remuneration. Also, approval of members by special resolution and of the remuneration Committee is required.

Answer 6(b)

Salient aspects of the Companies (Director Identification Number) Rules, 2006 leading to the issue of Director Identification Number (DIN) are given as below:

- (1) Application by concerned person by electronic mode for DIN to the Central Government through designated portal of the Ministry of Corporate Affairs.
- (2) The applicant shall access form DIN No.1 from the portal, fill in the required particulars and use 'submit' function. Thereafter, the system will electronically generate and indicate in the space provided a provisional DIN.
- (3) The provisional DIN shall be valid for a period of 60 days from the date on which it was generated.
- (4) After getting provisional DIN, the applicant shall, submit a formal application to the Central Government within 60 days from the date of generation of provisional DIN.
- (5) The applicant shall take a print out of form No.DIN-1, affix his photograph in specified place in the form, and enclose true copies of proof of identity and proof of residence. He shall then physically sign the form at the specified place. The photograph and the proof of identity and residence shall be Pre-certified by any one of the following – (i) Gazetted Officer of the Central Government or any State Government; (ii) Notary Public; (iii) a practicing Company Secretary or Chartered Accountant or a Cost and Work Accountant; (iv) Company Secretary in full time employment of the company.

(6)The Central Government shall communicate within one month of receipt of application, its approval or disapproval of the application, in writing by a letter or by electronic mode.

(7)If DIN is allotted, it is valid for life time of the recipient.

(8)The applicant, within one month of receipt of DIN, shall intimate to the company or companies concerned in which he is a director, the DIN in Form DIN-2.

(9)The company/companies, in turn, shall intimate the DIN communicated to it within one week of receiving the DIN, to the concerned ROC in DIN-3.

(10)Every director, in the event of any change in his particulars as stated in Form No. DIN-1, who has been allotted a Director Identification Number under these rules, shall intimate such change(s) to the Central Government within a period of 30 days of such change(s) in particulars by using Form No. DIN-4 made available by the Ministry on its website. The concerned director will also intimate such changes to the company or companies on which he is a director.

Question 7

(a)Answer the following with reference to Secretarial Standard–7 on passing of Board resolution by circulation process :

(i)Who is authorised to decide that certain resolutions (other than those specified in section 292) are to be taken up for consideration by circulation as against in a meeting ?

(ii)What procedure is to be followed for passing a resolution by circulation ? Are interested directors eligible to receive the proposed resolution and related papers ?

(iii)How is a proposed (circulated) resolution considered approved or not ?

(iv)A notice accompanying the proposed resolution provides for 7 days to intimate directors' assent or dissent. On which date the resolution shall be deemed to be approved when assents from required majority have been received within 3 days of the circulation? (2 marks each)

(b)State the matter along with relevant section(s) of the Companies Act, 1956 for which the following E-Forms are required to be filed :

(i)E-Form 1B

(ii)E-Form 20B

(iii)E-Form 23B

(iv)E-Form 25C. (1 mark each)

(c)State the requirement for audit of the financial accounting statements under the UK Companies Act, 2006. (4 marks)

Answer 7(a)

(i)Secretarial Standard (SS-7) authorizes the Chairman of the Board or Managing Director and in their absence any other director to decide whether the approval of the Board for a particular matter is to be obtained by means of resolution by circulation. Where there is no Chairman or managing director, any other director should decide whether the approval of the Board for a particular business should be obtained by means of a resolution by circulation.

(ii)Procedure for passing a resolution by circulation–

A resolution proposed to be passed by circulation should be sent in draft form, together

with the necessary papers, individually to all the directors or, in the case of a Committee to all the members of the Committee, at the same time.

Each business proposed to be passed by way of resolution by circulation should be explained by a note setting out the details of the proposal and the draft of the resolution proposed.

The draft of the resolution to be passed and the necessary papers should be circulated by hand, or by post, or by facsimile, or by email or by any other electronic mode.

Further, interested directors are eligible to get the draft resolution and accompanying papers.

(iii) The resolution is passed, when it is approved by a majority of directors entitled to vote on the resolution other than interested directors. The resolution is deemed to have been passed on the date on which it is approved by the majority of the Directors. If any special majority or the affirmative vote of any particular director or directors is specified in the Articles, the resolution should be passed only with the assent of such special majority or such affirmative vote.

(iv) The proposed resolution shall be deemed to be passed when assent of required majority is received ignoring the interested director(s). Accordingly, the proposed resolution shall be deemed to be passed on the 3rd day of circulation.

Answer 7(b)

(i) E-Form 1B – Application for approval of the Central Government for change of name (section 21) or conversion of a public company into a private company (section 31).

(ii) E-Form 20B – Form for filing Annual Return by a company having a share capital with ROC (Section 159).

(iii) E-Form 23B – Information by auditor to Registrar intimating about his appointment [Section 224(1A)].

(iv) E-Form 25C – Return of appointment of Managing Director or whole-time Director or Manager [Section 269(2) and Schedule XIII.]

Answer 7(c)

Requirement for audited accounts (Section 475 of the UK Companies Act, 2006)

A company's annual accounts for a financial year must be audited in accordance with this Part unless the company—

(a) is exempt from audit under section 477 (small companies), or section 480 (dormant companies); or

(b) is exempt from the requirements of this Part under section 482 (nonprofit-making companies subject to public sector audit).

A company is not entitled to any such exemption unless its balance sheet contains a statement by the directors to that effect.

A company is not entitled to exemption under any of the provisions mentioned in subsection (1)(a) unless its balance sheet contains a statement by the directors to the effect that—

(a) the members have not required the company to obtain an audit of its accounts for the year in question in accordance with section 476, and

(b) the directors acknowledge their responsibilities for complying with the requirements

of this Act with respect to accounting records and the preparation of accounts.

Question 8

*Distinguish between **any four** of the following with reference to the provisions of the Companies Act, 1956:*

(i) 'Debenture' and 'deposit'.

(ii) 'Reduction of share capital' and 'buy-back of shares'.

(iii) 'Director' and 'deemed director'.

(iv) 'Dividend' and 'bonus shares'.

(v) Legal basis of 'issue of shares at a discount' and 'issue of shares at a premium'.

(4 marks each)

Answer 8

(i) Distinction between Debenture and deposit

Debenture

Section 2(12) of the Companies Act, 1956 defines debenture as follows:

Debenture includes debenture stock, bonds and any other securities of a company, whether constituting a charge on the assets of the company or not. Debenture is a document evidencing a debt or acknowledging it and any document which fulfills either of these conditions is a debenture.

The important features of a debenture are:

1. It is issued by a company as a certificate of indebtedness.
2. It usually indicates the date of redemption and also provides for the repayment of principal and payment of interest at specified date or dates.
3. It usually creates a charge on the undertaking or the assets of the company. In such a case the lenders of money to the company enjoy better protection.

Deposit

Any money received by a non-banking company from any person or any money borrowed in any form from any person is a deposit under Companies Act and the Deposit Rules, unless it qualifies for exemption under rule 2 (b). Therefore, the company must ensure that any money borrowed by the company, regardless of whether it is called deposit or not, is a deposit within the meaning of the Deposit Rules.

(ii) Distinction between Reduction of share capital and buy-back of shares

Reduction of Share Capital (paid up) is governed by the provisions of section 100 of the Companies Act, 1956 whereas the Buy Back of Share is permitted under section 77A of the said Act. Reduction of capital requires passing of special resolution, obtaining consent of all the creditors of the company. Further, High Court's confirmation is required which is a cumbersome and time taking procedure. Power to enforce buyback is vested in the Board of Directors subject to maximum of 10% of the paid up capital. If the buyback exceeds this limit then approval of the Members by special resolution is required.

In buyback, shares bought back has to be extinguished and the share certificates are required to be destroyed whereas in case of the Reduction, there is no such requirement, though the company has to add the words 'and reduced' at the end of its name for a period specified in the court order confirming reduction. In reduction of

capital, every shareholder whose shares are subject to reduction is to adhere to the court order but in buyback, each shareholder has the option not to sell back his shares to the company.

(iii) Distinction between Director and deemed director

Section 2(13) of the Companies Act, 1956 defines the term 'director' in an inclusive manner. It states that a director is a person occupying the position of a director by whatever name he is called. The Act does not contain any definition of 'deemed director'. The definition of director places reliance on functions that a person is discharging in a company rather than a particular position held by him. The meaning of director in the Act has to be understood in a generic sense as a person having the power to direct. Besides, the Act has specified in many places the duties and functions of directors e.g. section 292, section 217 etc.

As regards deemed directors, one has to refer to section 5 and 7 of the Act. Under these sections, even though one does not carry the designation of director or does not perform as a director in a company but he can be treated as a director for certain purposes of the Act. Generally, if he is a person whose directions determine the performance of the directors, he will be treated as a director. Such a person wields actual powers without coming to the surface. However, he is not entitled to exercise any statutory right and power of a director. A deemed director need not necessarily be an individual whereas a director will have to be an individual.

(iv) Distinction between Dividend and bonus shares

Dividend is the return on the share capital subscribed for and paid to a company by its shareholders. The term "dividend" has been defined under Section 2(14A) of the Companies Act, 1956 (the Act) as "dividend" includes any interim dividend. The dictionary meaning of the term 'dividend' is sum payable as interest on loan or as profit of a company to the creditors of an insolvent's estate or an individual's share of it. In commercial parlance, however, dividend is the share of the company's profit distributed among the members.

When a company has accumulated free reserves and is desirous of bridging the gap between the capital and fixed assets, it issues bonus shares to its equity shareholders. Such an issue would not place any fresh funds in the hands of the company. On the contrary, after a bonus issue it would become necessary for the company to earn more to effectively service the increased capital. The shareholder will, however, be benefited by way of higher return on investment and more number of shares in their hands.

A dividend requires an outflow of cash, whereas in the case of issue of bonus shares, no cash flows are involved.

(v) Distinction between Legal basis of issue of shares at a discount and issue of shares at a premium

In simple terms, issue of shares at a discount means a company issuing such shares receiving a predetermined consideration which is lower than the nominal value of such shares. As against this, the issue of shares at a premium means the company receiving a predetermined consideration which is higher than the nominal value of the shares issued.

Issue of shares at discount is regulated by section 79 of the Companies Act, 1956. On the other hand, provisions regarding issue of shares at a premium are contained in section 78 of the Act.

As per section 79, shares can be issued at a discount on fulfillment of the following conditions:

- 1.The issue has to be authorized by a special resolution of the company.
- 2.The issue has to be sanctioned by the CLB.
- 3.The resolution has to specify the maximum rate of discount which at present is 10%. The rate of discount can be fixed at a higher rate provided the CLB is satisfied that a higher rate may be allowed under special circumstances.
- 4.The shares to be issued at a discount should be of a class which has already been issued.
- 5.One year has elapsed since the date the company was entitled to commence business.
- 6.The issue must be made within 2 months of the sanction by the CLB. However, CLB has the power to extend the period.

A company is free to issue shares at a premium as Section 78 does not impose any condition for such issues. However, the section regulates the maintenance and utilization of the amount of premium realized on the issue. It requires the premium to be credited to 'Securities Premium Account' and can only be used for-

- 1.Issue of bonus shares (fully paid).
 - 2.Writing off preliminary expenses.
 - 3.Writing off the expenses and discount on issue of shares/debentures.
 - 4.Providing premium on redemption of preference shares/debentures of the company.
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