

MOCK TEST PAPER – 2

FINAL COURSE: GROUP – I

PAPER – 4 : CORPORATE AND ALLIED LAWS

SUGGESTED ANSWERS/HINTS

1. (a) Chartered Accountants appointed by a company on a regular basis are hit by a restrictive provisions of sub-sections 1 and 1(b) of Section 314 if he is a director receiving remuneration over and above to which he is entitled. In case the office or place of profit is held by an individual other than a director or by any firm, private company or other body corporate, if it obtains from the company anything by way of remuneration whether as salary, fees, commission perquisite or otherwise, approval of the company is not required where the monthly remuneration is less than Rs. 50,000/-. Accordingly, if a director is holding the place of Chartered Accountants for the company he would be covered by Section 314(3) irrespective of the fact that office or place of profit carries a total monthly remuneration less than Rs.50,000/-.
- (b) The power to donate to general charities is not conditional to existence of any profit. In such a case they may contribute up to the limit given in Section. 293A (1) (e), even though the company may be working at a loss. Under the section a public company can contribute in any financial year not exceeding 5% of its average net profits during the three preceding financial years whichever is greater.
- (c) (i) "Stock Exchange" as defined under Section 2(j) of the Securities Contracts (Regulation) Act, 1956 means –
 - (a) any body of individuals, whether incorporated or not, constituted before corporatisation and demutualisation under sections 4A and 4B of the said act, or
 - (b) a body corporate incorporated under the Companies Act, 1956 whether under a scheme of corporatisation and demutualisation or otherwise, for the purpose of assisting, regulating or controlling the business of buying, selling or dealing in securities.'
- (ii) "Securities" as defined under Section 2(h) of the Securities Contracts (Regulation) Act, 1956 include—
 - (a) Shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;
 - (i) derivative;

- (ii) units or any other instruments issued by any collective investment scheme to the investors in such schemes;
 - (iii) Security receipt as defined in clause (zg) under section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security interest Act, 2002.
 - (iv) units or any other such instrument issued to the investors under any mutual fund scheme;
 - (v) any certificate or instrument (by whatever name called), issued to an investor by any issuer being a special purpose distinct entity which possesses any debt or receivable, including mortgage debt, assigned to such entity, and acknowledging beneficial interest of such investor in such debt or receivable, including mortgage debt, as the case maybe;
- (b) Government Securities
 - (i) Such other instruments as may be declared by the Central Government to be Securities; and
- (c) Rights or interests in securities;
- (d) The Companies (Amendment) Act, 2000 has prescribed additional duty on the Board of directors to include in the Director's report the additional particulars by way of Directors' Responsibility Statement. The details are:-
 - (i) That in the preparation of the annual accounts the applicable accounting standards had been followed along with proper explanation relating to material departures.
 - (ii) That the directors had selected such accounting policies and applied them consistently and made judgments and estimates that are reasonable and prudent so as to give a true and fair view of the state of affairs of the company at the end of the financial year and of the profit or loss of the company for that period.
 - (iii) That the directors had taken proper and sufficient care for the maintenance of adequate accounting standards in accordance with the provisions of this Act for safeguarding the assets of the company and for preventing and detecting fraud and other irregularities.
 - (iv) That the directors had prepared the annual accounts on a going concern basis. [Section 217 (2AA)]
- 2. (a) In *A.K. Puri vs. Devi Dass Gopal Kishan Ltd.*, (1995) 17CLA, the J&K High Court held that there was no conflict of jurisdiction with respect to Sections 397, 398 and Section 433. The court observed that there is no statutory provisions in the

Companies Act which provides for stay of the winding up proceedings under Section 433 when the CLB was seized of a petition between the same parties under Section 397/398. In other words, there is neither explicit nor implicit to carry on the winding up proceedings even when the CLB was seized of the matter.

The question whether shareholders can file a writ petition for relief against Oppression and Mismanagement during pendency of proceedings before the CLB, the Supreme Court in *World-wide Agencies Pvt. Ltd., vs. Mrs. M.T. Desor* (1990) 67 CC. 607 held against such filing as a shareholder cannot be allowed to bypass the express provisions of the Companies Act.

Winding up petition as a creditor on ground of inability to pay debts is not a bar to admission of a composite petition under Section 397 and 398 by the same party in the capacity of a member. [*MMTC Ltd. vs. Indo French Biotech Enterprise Ltd* (2000)] 23 SCL 192 (CLB)].

- (b) Under section 220(1) of the Companies Act, 1956, after the balance sheet and profit and loss account have been laid before the annual general meeting, three copies thereof be filed with the Registrar of Companies, within 30 days from the date on which the Accounts were laid at the Annual General Meeting. Where the Annual General Meeting for any year has not been held, the accounts shall be filed with the Registrar of Companies within 30 days from the latest date when the Annual General Meeting ought to have been held in accordance with the provisions of the Act, namely, sections 166 and 210 of the Act. Under section 220(2), it is also provided that if annual general meeting does not adopt the annual accounts or if the Annual General Meeting for any year is not held, a statement of that fact and of the reasons shall be annexed to the accounts filed with the Registrar of Companies.

Accordingly,

- (i) In the present case though Annual General Meeting was not held, it ought to be held by 30th September 2010 under sections 166/210 of the Act. Thus, the balance sheet and profit and loss account for the year ended 31st March 2010 be filed with the Registrar of Companies by 29th October 2010 along with a statement that Annual General Meeting was not held by 30th September 2010 as the accounts were not ready.
- (ii) Since the Annual General Meeting has been held in time on 27th September 2010, the balance sheet and profit and loss account as at 31st March 2010 be filed with the Registrar of Companies by 26th October 2010. A statement be also annexed to the balance sheet that the accounts were not adopted at the Annual General Meeting held on 27th September 2010 giving reasons there for.
3. (a) (i) As per the notification dated 12th September, 1996, a person who is otherwise qualified but has attained the age of 70 years can be appointed as Managing

Director without Central Government's approval if his appointment is approved by a special resolution passed by the company in general meeting. So Mr. A can be reappointed for a period of five years if the approval of the shareholders is obtained by special resolution.

- (ii) As per the notification dated 12th September, 1996, if the appointee is managerial person of more than one company, he shall draw remuneration from one or both companies provided that the total remuneration drawn from both the companies does not exceed the higher maximum limit admissible from any one of the companies of which he is the Managing Director. Accordingly, Mr. X can draw remuneration from both the companies provided the same is within the overall ceiling mentioned in the notification as stated above.
- (iii) Rule 10B of Companies (Central Government's) General Rules and Forms, 1956, permits sitting fees to be paid upto Rs. 20,000 to Directors if paid-up share capital and free reserves of Rs.10 crore and above or turnover of Rs.50 crores and above. For others not to exceed Rs.10,000/-.

In the instant case, increase in sitting fees is within the ceiling of Rule 10B, no approval of the Central Government is required. However, the company has to see the limits prescribed.

- (iv) As per Section 293(1)(a) of the Companies Act, 1956, Board has to obtain the approval of shareholders for sale or disposal of any undertaking of the company. Any decision by the Board to sell the sugar mill will not be valid unless it is approved by the shareholders in general meeting. In the instance case the Board cannot accept the offer even if it is attractive. The acceptance is ultra vires the Board. Section 293 speaks about "Consent" of the shareholders. The consent implies only prior consent. Directors cannot sell the undertaking with the hope that it will be ratified by members.
- (b) There is no statutory requirement that a director must hold qualification share. Share qualification is to be obtained by a director only if the Articles of the company do require. Where the Article requires a director to hold qualification shares, a director who is not already qualified, shall obtain the qualification shares within 2 months of his appointment as a director. Any provision in the Articles shall be void in so far as it requires a person to hold the qualification shares before his appointment as a director or to obtain them within a shorter time than 2 months. Further, the nominal value of qualification shares shall not exceed Rs. 5,000.

According to the provision, the above value of qualification shares as per the Articles is Rs.10,000. Since this amount exceeds the maximum amount that is Rs. 5000 as laid down under Section 270, the articles are inconsistent with the act, and therefore void.

4. (a) (i) Where total number of directors are 12 and 2 offices of the directors have

fallen vacant, we find: $\frac{1}{3}$ of $(12-2) = \frac{1}{3}$ of 10 = 3 $\frac{1}{3}$ directors. If the fraction of 3rd were to be rounded off as one then 4, i.e. 3+1 directors would constitute the quorum for the Board meetings.

- (ii) If at any time the number of the remaining directors exceeds or is equal to two thirds of the total strength, the number of the remaining directors who are non-interested but present at the meeting, not being less than two shall constitute the quorum. For example, there are in all 15 directors and the Board meeting commences with all the 15 directors. During the currency of the meeting, an item comes up for discussion in respect of which 13 happen to be "interested" directors. In this case, in spite of the excess of the interested directors being more than two-thirds, the prescribed minimum number of non-interested directors constituting the quorum, namely, 2 present at the meeting are to transact the particular item of business.

- (b) The expression 'misfeasance' means grave breach of duty or abuse of power usually associated with taking undue benefit or advantage at the cost of the company. The misfeasance proceedings initiated under Section 543 against a director of a company in winding-up can be continued on his death against his heirs and legal representatives for the purpose of determining and declaring the loss or damage caused to the company though no compulsive order may be made in those proceedings under Section 543 against the heirs and legal representatives. On conclusion of the proceedings under Section 543 a declaration of liability may be made. Such declaration partakes the character of a decree in a suit and can be enforced under Section 634 and 635. The provisions of Section 50 of CPC have to be applied when the person who is made liable dies and the liability of the legal representatives should be determined accordingly [*Official liquidator vs. Pasthasarathi Sinha (1983) 53 Comp. Cases 163 (SC)*].

- 5. (a) (i) Section 224A of the Companies Act, 1956 provides that in case of a company in which 25 per cent or more of the subscribed share capital is held whether simply or in any combination by: (i) a public financial institution or a Government Company or Central Government or any State Government; or (ii) Any financial or other institution established by any provincial or State Act in which a State Government holds not less than 51 per cent of the subscribed share capital or (iii) a nationalised bank or an insurance company carrying on general insurance business, the appointment of an auditor shall be made by a special resolution only.

Section 224A does not specify the date on which 25 percent of the subscribed capital must be held by the specified institution(s). The Department of Company Affairs has clarified that the material date is the date of the annual general meeting at which the special resolution is required to be passed. Thus, even though, the shareholding of LIC and UTI increased beyond 25% only

after issue of notice, Section 224A shall be required to be complied with. Fresh notice of the meeting shall become necessary.

- (ii) If the company fails to pass a Special Resolution where it is required to be so passed for appointment of auditor, it shall be deemed that no auditor(s) had been appointed by the company at its annual general meeting and the Central Government will be empowered to make the appointment [Section 224A(2)].
- (b) As per the SEBI (ICDR) Regulations 2009, vide Regulation 26 (d) & (e), a listed Company shall be eligible to make a public issue of equity shares or any other security which may be converted into or exchanged with equity shares at a later date provided
 - (d) the aggregate of the proposed issue and all previous issues made in the same financial year in terms of issue size does not exceed five times its pre-issue net worth as per the audited balance sheet of the preceding financial year;
 - (e) if it has changed its name within the last one year, at least fifty per cent. of the revenue for the preceding one full year has been earned by it from the activity indicated by the new name.

Applying the above Regulations, the questions as asked in the problem can be answered as under:

1. There are two conditions in the guidelines as stated above viz.i) that the aggregate issue i.e. proposed + all the previous issues made in the same financial year should not exceed 5 times the net worth of the Company; ii) there is no change in the name of the issuer Company within the last 1 year. In the question the proposed issue of Rs.300 crores + Previous issue in the same financial year is Rs.20 crores, making an aggregate of Rs.320. Since the aggregate of the issue is more than 5 times of Net Worth, i.e. more than Rs.300 crores , the proposed offer is not within the limit, Company cannot proceed ahead with in the proposed issue of Rs.300 crores.
 2. In the second case the net worth is only Rs.30 crores. 5 times of the net worth comes to Rs.150 crores only. Since the aggregate of the proposed issue and the previous issue during the same financial year is Rs.320 crores, which is exceeding the limits of Rs.150 crores, as calculated above, the Company cannot proceed with the public issue of shares as proposed in the second case.
 3. In the third case the offer cannot be made since the current year revenue is less than 50% of the total revenue of the previous year.
6. (a) Under Section 36AE of the Banking Regulation Act, 1949, if the Central Government is of the opinion that a Banking company has failed to comply with the direction

given by RBI relating to policy matters under section 21 and 35A and or the affairs of the Bank are being managed in a manner detrimental to the interest of depositors or that of the banking policy or for better provision of credit generally or of credit to any particular section of the community or in any particular area; it is necessary to the Government may after consultation with RBI, by notified order, acquire the undertaking of a Banking Company. In such a case, on the date specified in the notification, the undertaking of the Banking Company and its assets and liabilities shall stand transferred to and vest in Central Government. Before acquiring the undertaking, the Central Government shall give a reasonable opportunity of hearing to the Banking Company.

- (b) In the present electronic MCA-21 system, there is a facility with the RoC to mark a company 'marked as having management dispute' on the basis of complaints received in his office. This marking created an alert and the documents are not approved and remain in the registry as work in process till it is demarked by the Registrar. In order to bring uniformity of practices by all RoC, MCA vide General Circular No. 19/2011 dated 2nd May, 2011 has clarified that the RoC shall use this facility as under:-
 - (i) The RoC shall mark a company as having management dispute in only those cases where the court or Company Law Board has directed to maintain the status-quo with reference to any e-forms including status of Directors in the company or
 - (ii) the Court or Company Law Board has granted any injunction or stay in taking the document on record and RoC is a party in such court cases and/or the directions have been issued to the RoC.
 - (iii) In other matter, where the RoC is not a party and such orders have been passed and has not been served to the RoC, it is for the parties to comply to such orders and in case of non-compliance, the law shall take its own course.
- 7. (a) In accordance with the provisions the Foreign Exchange Management Act, 1999 as contained in Section 5, certain Rules have been made for drawal of Foreign Exchange for Current Account transactions. As per these Rules, drawal Foreign Exchange for some of the Current Account transactions is prohibited. As regards some other Current account transactions, Foreign Exchange can be drawn with prior permission of the Central government while in case of some Current Account transactions, prior permission of Reserve Bank of India is required.
 - (i) In respect of item (a), i.e., remittance to Nepal, such remittance is prohibited and the same is included in First Schedule to be Foreign Exchange Management (Current Account Transactions) Rules, 2000. Hence, Mr. Atul cannot withdraw Foreign Exchange for this purpose.
 - (ii) The type of payment as envisaged in item (b) is covered under Third Schedule

to the Foreign Exchange Management (Current Account Transactions) Rules 2000 and for withdrawing foreign Exchange exceeding 5% (five percent) of the inward remittance as commission to agent abroad for sale of commercial plot in India, Mr. Atul will require the prior permission of the Reserve Bank of India.

- (b) **Term of office of chairperson and other members are contained in Section 10 of the Competition Act, 2002:** As per this section the chairperson and every other member shall hold office as such for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment. They shall not hold office as such after attaining the age of sixty-five years. [Section 10(1)]

A vacancy caused by the resignation or removal of the chairperson or any other member by death or otherwise shall be filled by fresh appointment in accordance with the provisions of Sections 8 and 9 of the Act. [Section 10(2)]

Keeping the above provision in mind Mr. RKP can be appointed as member of the commission for a term of 5 years as he is aged 56 years on 1-1-09. He can also be reappointed but his reappointment will be only up to the age of 65 years. If Mr. RKP resigns as member after working for two years the resulting vacancy can be filled up by fresh appointment approved by the Selection Committee and the Chairman has no power to fill up the vacancy on his own.

- (c) As per provisions of Section 581ZJ of the Companies Act, 1956, any Producer Company may, upon recommendation of the Board and passing of resolution in the general meeting, issue bonus shares by capitalization of amounts from general reserves referred to in Section 581ZI in proportion to the shares held by the Members on the date of the issue of such shares.
- (d) A provision containing the words 'notwithstanding' is generally termed as 'non obstante clause'. The provision containing the word 'notwithstanding' has an over-riding effect on the other provision, i.e., such provision shall prevail over the other provision. In other words, if there is any inconsistency or departure between the non obstante clause and another provision, it is the non obstante clause which will prevail. Accordingly, a non obstante clause restricts the operation and effect of all the contrary provisions.

For example, section 265 of the Companies Act, 1956 provides for appointment of directors by proportional representation. It reads as –“Notwithstanding anything contained in this Act,...”. The effect of the non obstante provision is that the appointment of directors under sec 265 is not to be affected by any other provision of the Companies act, 1956. In other words, the directors can be appointed by way of proportional representation even if such appointment would not be permissible under any other provision of the Act, e.g., Sections 255 and 256.

Where a section contains the word 'notwithstanding', it over-rides the other provisions as specified in the section. This can be explained as under:

Where a provision is framed as “Notwithstanding anything contained in this Act,...”, it over-rides the entire Act, e.g., Section 265 of the Companies Act, 1956.

The words ‘without prejudice’ are used in an Act as follows:

- (i) An expression containing the words ‘without prejudice to the generality of ...’ indicates that anything contained in the provision following such words is not intended to cut down the generality of the meaning of the preceding provision. For example, section (j) of FEMA reads as – “Current Account Transaction means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transaction includes, (1)...,(ii)...,(iii)...and (iv)...” Thus, transactions referred to in clauses (i) to (iv) are illustrative only and do not restrict the meaning of the ‘Current’ under ‘Current Account Transaction’; any Transactions that is not a Capital Account Transaction shall still be covered under ‘Current Account Transaction’.
- (ii) An expression containing the words ‘without prejudice to the provisions of section...’ means that the expression shall not affect anything done in pursuance of the section which follows such words. For example, sec 37(2) of FEMA reads as- “Without prejudice to provisions of sub-section (1),...” Thus, section 37 (2) does not affect anything done in pursuance of sec 37 (1).

(e) Rights or Interest in financial assets acquired under the SARFAESI Act, 2002 (Section 5): Notwithstanding anything contained in any agreement or any other law for the time being in force, any securitisation company or reconstruction company may acquire financial assets of any bank or financial institution-

- (i) by issuing a debenture or bond or any other security in the nature of debenture, for consideration agreed upon between such company and the bank or financial institution, incorporating therein such terms and conditions as may be agreed upon between them; or
- (ii) by entering into an agreement with such bank or financial institution for the transfer of such financial assets to such company on such terms and conditions as may be agreed upon between them.

Debenture as we commonly know, is an acknowledgement of debt. Bond also refers to the same nature of instrument as a debenture. Both of them acknowledge a debt and hence an obligation to pay.

In case the bank or financial institution is a lender in relation to any financial assets acquired by the securitisation company or the reconstruction company, then such securitisation company or reconstruction company shall, on such acquisition, be deemed to be the lender and all the rights of such bank or financial institution shall vest in such company in relation to the subject financial assets.

Unless otherwise expressly provided by this Act, all contracts, deeds, bonds, agreements, powers-of-attorney, grants of legal representation, permissions, approvals, consents or no-objections under any law or otherwise and other instruments of whatever nature which relate to the said financial asset and which are subsisting or having effect immediately before the acquisition of financial asset and to which the concerned bank or financial institution is a party or which are in favour of such bank or financial institution shall, after the acquisition of the financial assets, be of as full force and effect against or in favour of the securitisation company or reconstruction company, as the case may be, and may be enforced or acted upon as fully and effectually as if, in the place of the said bank or financial institution, securitisation company or reconstruction company, as the case may be, had been a party thereto or as if they had been issued in favour of securitisation company or reconstruction company, as the case may be.

If, on the date of acquisition of financial asset, any suit, appeal or other proceeding of whatever nature relating to the said financial asset is pending by or against the bank or financial institution, save as provided in the third proviso to sub-section (1) of section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) the same shall not abate, or be discontinued or be, in any way, prejudicially affected by reason of the acquisition of financial asset by the securitisation company or reconstruction company, as the case may be, but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or against the securitisation company or reconstruction company, as the case may be.