

Corporate and Other Laws
Revision Test Paper CAP-II
Question and Answer

Nepal Chartered Accountants Act, 2053 and Nepal Chartered Accountants Rules, 2061

1. Mr. Sharma, a FCA member of ICAN was appointed as manager of ABC Trading Ltd. on 2065-12-1. He discontinued his job on 2066-12-1. As he had a good relation with the company and its management, the general meeting of the company appointed him as auditor of the company for the fiscal year 2067/2068 on 2067-9-29. Mr. Sharma signed the audit report on 2068-9-20. Mr. Sharma is alleged to have given statement without due care and Mr. Shrestha an engineer who has no connection with the company filed a complaint at ICAN against Mr. Sharma on 2073-1-25. Decide in accordance with Nepal Chartered Accountants Act and Rules.
 - a) Did Mr. Sharma commit misconduct?
 - b) Can Mr. Shrestha file such complaint? Explain with considering time limitation as prescribed in Nepal Chartered Accountants Rule, 2061?
 - c) What are the procedures of Investigation on a complaint against the member of ICAN?

Answer:

- a) Mr. Sharma has violated following provisions.
 - i) Nepal Chartered Accountants Act Section 34(9): Members holding Certificate of Practice shall discharge their duties with due care in the course of their profession and shall draw attention of all concerned to all material facts which are or have take place contrary to the prevailing law and do not comply with generally accepted principles of auditing.
 - ii) Section 34 (12) One shall not perform audit of accounts of any organization where he has served until the elapse of at least three years of his leaving the service.
Mr. Sharma accepted appointment within almost one year only from his leaving of service.
- b) Nepal Chartered Accountants Rule, 2061- Rule 80- May file complaint: Any member or a person may file a complaint attaching available facts against the member who according to his/her thinking is acting against the Act or rules set up under it or the code of conduct with a fee of one hundred rupees.

Provided that such fee shall not be applicable to any governmental body or body fixed by the council declaring about non applicability of complaints fee.

On the basis of above provision Mr. Shrestha can file a complaint. Non- member can also file a complaint.

Rule 83. The time limit for investigation: No investigation shall be executed on a complained about the happening of 3 years ago.

Provided that if a request for investigation of serious nature activities is received by an authorized authority of Government body or council considers appropriate to investigate such activities, investigation and legal proceeding may be carried out.

As the complaints was filed crossing the time limit, so Complaints cannot be entertained.

c) Procedures of Investigation:

- Under rule 81. Investigation on a complaint: (1) The Institute shall forward a complaint filed under rule 80 to Disciplinary Committee for investigation.
- (2) While investigating the complaint the disciplinary Committee shall notify the member on his/her address if the complaint is filed against a member and on the address of the accounting professional firm if the complaint filed is against an accounting firm directing to clarify within 15 days why not an action should be taken against such member or the accounting firm mentioning probable punishment if the allegation is proved.
 - (3) The alleged member or accounting professional firm notified according to sub-rule (2) shall have to reply pertinently in the alleged subject matter within the specified time period.
 - (4) If felt essential by the disciplinary committee a copy of the reply received according to sub-rule (3) shall be sent to the complainer for response within 15 days.
 - (5) If a response is demanded according to sub-rule (4), the complainer shall have to reply promptly within the prescribed period with evidences (if any) supporting the claim or allegation.
 - (6) After receiving a response according to sub-rule (5), a copy of it shall be sent to the alleged member or the accounting firm to defend within 15 days.
 - (7) If felt essential, the disciplinary committee can demand any additional details, documents or information required from the complainer or the alleged member or the accounting firm.

- (8) If demanded any details, documents or information under sub-rule (7) the concerned complainer or the member or the accounting professional firm shall have to provide such details, documents or information.
- (9) The disciplinary committee if decides essential can record the statement of the complainer or the alleged member or the partner of the accounting professional firm and such complainer or member or partner can defend himself/herself or appointing a legal professional.
- (10) Nothing written in this rule shall hinder the proceedings of the disciplinary committee in accordance with evidences available even if the alleged member or the accounting professional firm does not reply or if the committee is not satisfied with the clarification or reply submitted or if the response according to sub-rule (4) or (6) or details/ documents/ information under sub-rule (8) is not obtained.
- (11) While investigating any complaint according to this rule the disciplinary committee can setup its procedures of their own if felt logical.

Provided that procedures applied shall have to be explained in the report in this regard.

Rule 84. Report to be submitted: (1) The disciplinary committee shall have to submit a report in the council on the proceedings of the investigation carried on the complaint filed against a member or an accounting professional firm in accordance with rule 81 with its recommendations.

(2) After being reported according to sub-rule (1), the council shall make a decision on the complaint following the procedures written below:

(a) The Council shall inform the complainer and order to replete the complaint if recommended to do so by the disciplinary committee.

(b) If the disciplinary committee submits its report declaring guilty the alleged member or firm, the council sending the alleged member or firm a copy of the report shall, once again, grant an opportunity according to sub-section (7) of section 14 of the Act to defend of his/her own or by appointing a legal representative. After receiving a reply from the alleged member or accounting professional firm in this connection, the council can direct the disciplinary committee for re-reporting performing more investigation on the subject if it feels essential.

- (c) After the completion of the procedure according to section (b) if a member or any or all partner of the firm is found guilty the council shall order punishment in accordance with sub-section (5) of the section 14 of the Act.
2. Discuss the offences which can be filed before Appellate Court under Nepal Chartered Accountants Act, 2053 with their respective punishment.

Answer:

Nepal Chartered Accountants Act, 2053

Section 41 of the Act deals with the offences which can be filed before Appellate Court under Nepal Chartered Accountants Act, 2053: Punishment: (1) A person, who carries out audit without obtaining a Certificate of Practice, pursuant to this Act, shall be liable of punishment with a penalty of maximum two thousand rupees or with an imprisonment for a maximum period of three months or with both.

(2) A person, who in contravention of Section 6 uses the name or the seal of the Institute or exercises any type of authority bestowed to the Institute, shall be punished with a penalty of one thousand rupees maximum on first conviction, and on any subsequent conviction thereafter, a maximum penalty of five thousand rupees or imprisonment for a maximum period of six months or both.

Provided that this sub-section shall not apply to the organizations or university established under their own legislation or the units within the Institute.

(3) A person, who has not obtained a Certificate of Practice and is proved to have signed any document in capacity of the member holding Certificate of Practice, shall be liable to punishment with a penalty up to two thousand rupees or imprisonment for a period of up to three months or both.

(4) A member, who commits any act contrary to the provisions of this Act or Regulations framed under this Act other than the provisions of this section, shall be suspended for a maximum period of five years and shall be liable of punishment with a maximum penalty of two thousand rupees or imprisonment for a maximum period of three months or both.

(5) A complainant who lodges a complaint, without any reasonable cause to make complaint and it is proved that the complaint was made with an intention to harass a member, shall be liable to punishment with fine up to one thousand rupees.

(6) The complain cases, except those to be heard under Section 14, lodged in the Council against any member, pursuant to Section 35, shall be instituted in the concerned Appellate Court.

The Companies Act 2063

3. What are the circumstances where the Company Registrar Office may refuse to incorporate a company?

Answer:

The Companies Act 2063

Under Sec 6 of the Act:

(1) The Office may refuse to register a company in any of the following circumstances: (a) If the name of the proposed company is identical with the name by which a company in existence has been previously registered or so resembles the name of that company as it might cause misleading,

(b) If the name or objective of the proposed company is contrary to the prevailing law or appears to be improper or undesirable in view of public interest, morality, decency, etiquette etc. or reflects criminal motive

(c) If the name of the proposed company is identical with the name of a company of which registration has been cancelled pursuant to this Act or that of a company which has been insolvent under the prevailing law or so resembles such name as it might cause misleading and a period of five years shall not expired after such cancellation of registration or insolvency,

(d) If the requirements for the incorporation of a company under this Act are not fulfilled.

(2) If the office refuses to register company in any of the circumstances as referred to in Sub-section (1) it shall give a notice there of, accompanied by the reasons therefore, to the applicant no later than 15 days after the date of application made for the incorporation of company pursuant to Section 4.

(3) If the office refuses to register any company pursuant to Subsection

(1) or fails to give a notice pursuant to Sub-section (2), a person who is not satisfied may file a complaint in the court within fifteen days.

4. On what conditions a company may issue or sell shares at a discount?

Answer:

Under Section 64 of Companies Act,

(1) A company shall not issue or sell its shares at a discount.

(2) Notwithstanding anything contained in Sub-section(1), a company may, on the following conditions, issue or sell shares at a discount by adopting a special resolution at the general meeting to that effect, not being less than the percentage specified in that resolution:

(a) In issuing or selling shares pursuant to a capital restructuring scheme of the company,

(b) In issuing or selling shares pursuant to a scheme of converting loans borrowed by the company into shares with the consent of creditors;

(c) In issuing or selling shares pursuant to an employee share scheme;

(d) In issuing shares on such other conditions as approved by the Office .

5. Daunne Resort Ltd is a public Ltd company having its registered office at Nawalparasi District. Some of the directors of the company desire to hold its general meeting at Butwal, Rupandehi but some other directors desire to hold its general meeting at Kathmandu. Suggest the company where should be the place of meeting as per Companies Act, 2063.

Answer:

Under section 67(4) of Companies Act, except in cases where the Office gives prior approval to hold the general meeting elsewhere, the general meeting of a public company shall be held either at the district where the registered office of such company is situated or at such place adjoining to the district of registered office as is convenient to most shareholders.

On the basis of above provision meeting can be held at Butwal Rupandehi if it is convenient to most shareholders. If Companies Registrar Office gives approval it can be held in any place. So, meeting can be held at Kathmandu with the approval of Company Registrar Office. The company shall fix the venue on the basis of considering above provision.

6. Enumerate the disqualification of auditors under Companies Act, 2063.

Answer:

Under Section 112 of Companies Act, 2063, (1) None of the following persons or the firms or companies in which such persons are partners shall be qualified for appointment as auditor and shall, despite appointment as auditor, continue to hold office:

- (a) A director, advisor appointed with entitlement to regular remuneration or cash benefit, a person or employee or worker involved in the management of the company or a partner of any of them or and employee of any of such partners or a close relative of a director or partner, out of them, or and employee of such relative;
- (b) A debtor who has borrowed moneys from the company in any manner, or a person who has failed to pay any dues payable to the company within the time limit and is in such arrears or close relative of such person;
- (c) A person who has been sentenced to punishment for an offense pertaining to audit and a period of three years has not elapsed thereafter;
- (d) A person who has been declared insolvent;
- (e) A substantial shareholder of the company or a shareholder holding one percent or more of the paid up capital of the company or his close relative;
- (f) A person who has been sentenced to punishment for an offense of corruption, fraud or a criminal offense involving moral turpitude and a period of five years has not elapsed thereafter;
- (g) A person referred to in Sub-section (3) of Section 111;
- (h) In the case of a public company , any person who works, whether full time or part time , for any governmental body or any body owned fully or partly by the Government of Nepal or any other company or a partner of such person or a person who is working as an employee of such partner or a person who is authorized to sign any documents or reports to be prepared by the management of the company;
- (i) A company or corporate body with limited liability;
- (j) A person having interest in any transaction with the company or his/her close relative or a director, officer or substantial shareholder of another company having any interest in any transaction with the company.
- (2) The auditor shall, prior to his/her appointment ,give information in writing to the company that he/she is not disqualified pursuant to Sub-section(1).
- (3) Where any auditor becomes disqualified to audit the accounts of a company or there arises a situation where he/she becomes disqualified for appointment or can no longer continue to act as an auditor of the company, he/she shall immediately stop performing audit which is required to be performed or is being performed by him/her and give information thereof to the company in writing.
- (4) The audit performed by an auditor who has been appointed in contravention of this Section shall be invalid.

Securities Act 2063

7. What are the functions, duties and powers of the Securities Board of Nepal?

Answer

Under section 5 of Securities Act, 2063, the functions, duties and powers of the Board shall be as follows:-

- (a) To offer an advice, as per necessity, to the Government of Nepal on matters incidental to the development of capital market,
- (b) To register the securities of any corporate body established with the authority to make a public issuance of its securities,
- (c) To regulate and systematize the issue, transfer, sale and exchange of registered securities,
- (d) To grant permission to any corporate body, which is desirous of operating a stock exchange, to operate the stock exchange subject to this Act or the Rules and bye -laws framed under this Act,
- (e) To regulate and monitor the activities of the stock exchange;
- (f) To inspect as to whether or not any stock exchange is executing its activities in accordance with this Act or the Rules and Bye-laws framed under this Act, and to suspend or revoke the license of such a stock exchange, if it is found that the same has not been done,
- (g) To issue a license to companies or institutions, which are desirous of carrying on the securities business subject to this Act or the Rules and Bye-laws framed under this Act,
- (h) To regulate and monitor the activities of securities business person,
- (i) To classify securities business persons and fix their standards according to their functions and capability by fulfilling such procedures as prescribed,

- (j) To grant a permission to operate collective investment schemes and investment fund programs, and to regulate and monitor the same,
- (k) To approve Bye-laws of stock exchanges and those bodies which are related with securities business and engaged in securities transactions, and to issue orders to stock exchanges and those bodies which are related with securities business and engaged in securities transactions to make necessary amendment in their Bye-laws with a view to making necessary provisions concerning the development of capital market and protecting the interests of investors in securities,
- (l) To systematize the clearance of accounts related to securities transactions,
- (m) To supervise whether or not security business persons have maintained such conduct as prescribed in this Act or the Rules, Bye-laws and Directives framed under this Act, while carrying on securities business, and suspend or revoke the license to carry on securities business where any securities business person is not found to have maintained such a conduct,
- (n) To make or cause to be made, such arrangements as may be necessary to regulate the volume of securities and the mode of securities transactions for the promotion, development and healthy operation of stock exchanges,
- (o) To make such arrangements as may be necessary to prevent insider trading or any other offense relating to securities transactions as referred to in Chapter-9 for the protection of the interests of investors in securities,
- (p) To review, or cause to be reviewed, financial statements submitted by corporate bodies issuing securities and securities business person, and give such directives to the concerned corporate bodies as it deems necessary in this connection,
- (q) To regulate and make transparent the act of acquiring the ownership of a company there by gaining control over its
- (r) To maintain coordination and exchange cooperation with the concerned agencies in order to supervise and regulate matters concerning securities or company affairs,
- (s) To perform or cause to be performed such other functions as may be necessary in relation to securities and the development of capital market.

8. Discuss the legal provision on Issue of a license to carry on stock exchange under Securities Act, 2063.

Answer:

Section 36,37 and 38 of the Securities Act, 2063 deals with the license as below.

36. License to be obtained to operate stock exchange:

- (1) A person who desires to operate a stock exchange shall obtain from the Board the license to operate the stock exchange under this Act.
- (2) No person shall operate a stock exchange or purchase, sell or exchange securities without obtaining from the Board a license under this Act nor shall any person use the name of stock exchange without obtaining such a license.
- (3) Notwithstanding anything contained in Sub-section (2), Nepal securities exchange market which is in operation at the time of commencement of this Act shall have to make an application to the Board for the license to operate a securities exchange market pursuant to this Act within one year from the date of commencement of this Act. Nothing shall be deemed to have been hindered the operating of the securities exchange market by Nepal securities exchange market within that period.
- (4) Where Nepal Securities Exchange Market fails to make an application to the Board for a license to operate a securities exchange market within the period referred to in Sub-section (3), Nepal securities exchange market shall not be entitled to operate the stock exchange after the expiry of that period.
- (5) Notwithstanding anything contained elsewhere in this Section, while incorporating any stock exchange as a company with limited liability under the companies law in force after the commencement of this Act, the Company Registrar's Office shall incorporate it only with the recommendation of the Board.

37. Application to be made to carry on stock exchange: (1) Only a body corporate may make an application to the Board for a license to carry on a stock exchange.

(2) A body corporate shall have to make an application referred to in Sub-section (1) in such format and accompanied by such details. Documents and fee as may be prescribed.

38. Issue of a license to carry on stock exchange: (1) If an application is received pursuant to Section 37, the Board may, if it is satisfied with the following matters by making necessary inquiry into the matter, issue a license to carry on a stock exchange in such format as may be prescribed:

(a) Where it considers that the issue of the license to carry on a stock exchange would serve the interests of investors and general public or the issuance of such a license is necessary for the proper operation of the stock exchange,

(b) Where the applicant body corporate has fulfilled the matters referred to in Sub-section (2).

(2) A body corporate which makes an application to the Board for a license to carry on a stock exchange pursuant to subsection (1) shall set out the following matters in the application:

(a) Legal provisions of establishing the body corporate its memorandum of association stipulates that the body corporate has been established with object to establish and operate at sock exchange,

(b) The body corporate maintains its paid up capital as prescribed by the Board that such capital is not less than fifty million rupees so long as the body corporate operates the stock exchange,

(c) There are sufficient grounds to the satisfaction of the Board that the body corporate can provide such infrastructures and facilities as may be required to operate the stock exchange,

(d) Matters relating to enlisting or making similar other provisions to recognize securities to be transacted through itself,

(e) Matters that the interests of investors would be protected through regular operation of transactions in securities through the provisions and systems to be adopted by the body corporate in relation to the exchange and transactions proposed by the body corporate for the operation of the stock exchange,

(f) That it has appropriate provisions on settlement of transactions in the stock exchange and publication of records thereof and statements of transactions,

(g) That complaints filed in relation to transactions carried on by its members can be examined in a proper manner,

(h) That action can be taken as mentioned in the Bye-laws in the event of failure of its members to fulfill the liabilities under the contract.

9. Write Short Notes on Formal Agent

Answer:

Section 64 and 65 of the Securities Act, 2063 deals with the formal agent as below.

Section 64. License not to be issued to carry on securities business without specifying agent: (1) No license shall be issued to any one to carry on securities business as a securities broker without specifying at least one person to act as an agent of the securities broker.

(2) No license shall be issued to any one to carry on securities business as a securities trader without specifying at least one person to act as an agent of the securities trader.

(3) No license shall be issued to any one to carry on securities business relating to collective investment scheme and investment fund management without specifying at least one person to act as an agent of the scheme manager.

(4) The procedures to be fulfilled in specifying an agent by a securities business person, qualification of the agent and provisions relating thereto shall be as prescribed.

65. Formal agent: (1) Only after the registration of the appointment of any person as an agent of a securities business person with the Board pursuant to Sub-section (3), such a person shall be deemed to be a formal agent for that securities business.

(2) In making registration of the appointment of an agent with the Board pursuant to Sub-section (1), the securities business person shall inform the Board about the appointment of such agent and the person to be appointed as an agent shall also inform the Board that he or she agrees to be an agent of such a securities business person.

- (3) Upon receipt of the notice pursuant to Sub-section (2), the Board shall, within fifteen days, make entry in the register as prescribed, specifying the name, address and other necessary details of the agent and issue the agent registration certificate to such an agent.
- (4) If the agreement made between the agent and the securities business person appointing the agent is canceled, for any reason whatsoever, information thereof shall be given to the Board immediately, and the agent shall also return the certificate obtained by him or her to the Board within seven days.
- (5) The securities business person who appoints a formal agent shall be responsible for all acts done by such a formal agent.

Banks and Financial Institutions Act, 2063

10. How can the licensed institution of higher class be converted into licensed institution of lower class under BAFIA.

Answer:

Under Section -37 of Banks and Financial Institutions Act, 2063, Conversion of licensed institution of higher class into licensed institution of lower class: (1) If any licensed institution fails to meet any of the following conditions, the Rastra Bank may make a decision to convert it into a Class “B” licensed institution if it is a Class “A” licensed institution, and into a Class “C” licensed institution if it is a Class “B” licensed institution:

- (a) If it has failed to raise the capital as prescribed within the period prescribed by the Rastra Bank;
- (b) If it has been incurring loss since five consecutive years;
- (c) If it has been subjected to action for frequent violations of the directives issued by the Rastra Bank;
- (d) If it has failed to maintain a risk-bearing fund as prescribed by the Rastra Bank.

(2) The Rastra Bank shall, prior to taking action against any bank or financial institution pursuant to Sub-section (1), give a reasonable opportunity to the concerned bank or financial institution to furnish its explanations against such action.

(3) If any licensed bank or financial institution of a higher class intends to be converted into a licensed bank or financial institution of a lower class and makes an application to the Rastra Bank for approval, and if the Rastra Bank gives its approval after making necessary inquiries, such bank or financial institution shall be converted into a licensed bank or financial institution of a lower class.

11. Discuss the legal provision on recovery of credit under BAFIA.

Answer:

Under Section 57 of BAFIA, (1) If any person, firm, company or institution fails to abide by the terms of the credit agreement or any terms and covenants made with a licensed institution or fails to repay credit to the licensed institution within the time-limit stipulated in the deed, or if the licensed institution finds through investigations that the borrower has not used the credit amount for the purpose for which it has been supplied or has misappropriated or misused it, the licensed institution may, notwithstanding anything contained in the concerned deed or in the laws in force, recover its principal and interest by auctioning or otherwise disposing of any property pledged to it, or any collateral or security deposited with it, by the borrower.

(2) If a person, firm, company or institution borrowing credit relinquishes in any manner the title to the property pledged to the licensed institution as a collateral or security or if the value of such collateral or security declines for any other reason, the licensed institution may, notwithstanding anything contained in the laws in force, ask the concerned person, firm, company or institution to furnish additional collateral or security within a period as prescribed by it. If the concerned person, firm, company or institution fails to furnish additional collateral or security within the time-limit prescribed by the licensed institution or if the principal and interest cannot be recovered from the collateral or security pledged, the licensed institution may, in accordance with the laws in force, recover its principal and interest from any other movable and immovable property owned by the borrower or to which the borrower has title.

- (3) The amount of principal and interest due to the licensed institution and the expenses incurred in auction or other disposal of a property made pursuant to this Section shall be deducted from the proceeds of such auction or disposal, and the balance, if any, shall be refunded to the concerned person, firm, company or institution.
- (4) The licensed institution shall write to the concerned office for registration or transmission of the assets auctioned by it pursuant to this Section in the name of the person who has taken over it on such auction in accordance with the laws in force.
- (5) When so requested by the licensed institution for registration or transmission pursuant to Sub-section (4), the concerned office shall make registration or transmission notwithstanding anything contained in the laws in force.
- (6) If no one offers a bid in an auction sale, by a licensed institution under this Section, of the movable and immovable property pledged as the collateral or security, the licensed institution shall take over the ownership of such property as prescribed.
- (7) The licensed institution shall write to the concerned office for registration or transmission of the property of which ownership has been taken over by such institution pursuant to Sub-section in its name. When so requested, the concerned office shall make registration or transmission of such property in the name of such licensed institution notwithstanding anything contained in the laws in force.
- (8) If the previous owner of the property taken over by a licensed institution or any person in an auction refuses to allow its possession and use and the licensed institution or that person requests to have the same available for possession and use according to the laws in force, the appropriate body of the Government of Nepal shall render necessary assistance.
- (9) No licensed institution shall hold up action for the recovery of credit which has not been written off pursuant to Clause (dd) of Sub-section (1) of, Clause (aa) of Sub-section (2) of, Clause (e) of Sub-section (3) of, and Clause (l) of Sub-section (4) of, Section
- (10) If any person, firm, company or institution has failed to repay the credit borrowed from a licensed institution within the repayment period of the credit deed, and while taking action pursuant to this Section for the recovery of such credit, the licensed institution concerned shall write to the Credit Information Center Limited to include such person, firm, company or institution in the black list in accordance with the laws in force.
- (11) If a credit cannot be recovered even while taking action for the recovery of such credit against any person, firm, company or institution pursuant to this Section, the licensed institution concerned may, for the purpose of recovering such credit also from any other property of the borrowing person, firm, company or institution situated abroad, institute action for the recovery of credit including the withholding of property in accordance with the laws in force.
- (12) If a credit cannot be recovered even upon taking all actions on recovery of credit pursuant to Clause s (1) to (8), the licensed institution may make a request to the Rastra Bank for necessary provision to withhold and seize the passport of the borrower person and to deprive such borrower from any facilities to be provided by the State. On receipt of such request, the Rastra Bank shall forward the matter, accompanied by its opinion, to the Government of Nepal for necessary action.

Nepal Rastra Bank Act, 2058

12. What are the objectives of Nepal Rastra Bank?

Answer

Under section 4 of Nepal Rastra Bank: (1) The objectives of the Bank shall be as follows:-

- (a) To formulate necessary monetary and foreign exchange policies in order to maintain the stability of price and balance of payment for sustainable development of economy, and manage it;
 - (b) To promote stability and liquidity required in banking and financial sector;
 - (c) To develop a secure, healthy and efficient system of payment;
 - (d) To regulate, inspect, supervise and monitor the banking and financial system; and
 - (e) To promote entire banking and financial system of the Nepal and to enhance its public credibility.
- (2) The Bank shall, without any prejudice to the objectives referred to in Sub-section (1), extend co-operation in the implementation of the economic policies of Government of Nepal.

13. Enumerate the assets consisting in the Foreign Exchange Reserve under Nepal Rastra Bank Act, 2063.

Answer

Under section 66 of NRB Act (1) The Bank shall mobilize the foreign exchanges reserve. Such reserve shall be denominated in the respective foreign exchange and such reserve shall consist of the following assets:-

- (a) Gold and other precious metals held by or for the account of the Bank;
 - (b) Foreign currencies held by or for the account of the Bank;
 - (c) Foreign currencies held in the accounts of the Bank on the books of a foreign central bank or other foreign banks;
 - (d) Special drawing rights (SDR) held by the Bank at the International Monetary Fund;
 - (e) Bill of exchange, promissory note, certificate of deposit, bonds, and other debt instrument payable in convertible foreign currencies issued by any debtor or liability holder and held by the Bank;
 - (f) Any forward purchase or repurchase agreements of the Bank concluded with or guaranteed by foreign central banks or public international financial institutions, and any futures and option contracts of the Bank providing for payment in freely convertible foreign currency.
- (2) While selecting the assets referred to in Sub-section (1), due consideration should be given to the Bank's capital and liquidity to maximize earnings.
- (3) The Bank shall maintain international reserve at a level, which shall be adequate for the execution of monetary and exchange rate policies and for the prompt settlement of the international transaction.
- (4) If international reserves have declined or, in the opinion of Bank, are in danger of declining to such an extent as to jeopardize the execution of the monetary or exchange rate policies in the prompt settlement of the country's international transactions, the Bank shall submit to Government of Nepal a report on the international reserves position and the causes which have led or may lead to such a decline, together with such recommendations as it considers necessary to remedy the situation.
- (5) Until such time as, the situation referred in Sub-section (4) has been rectified, the Bank shall make further such report and recommendations to Government of Nepal.
- (6) The Bank shall hold the foreign exchange reserve referred to in Sub-section (1) in its balance sheet.

Industrial Enterprises Act, 2049

14. Baneshor International Hotel is closed down because of strike of employee without fulfilling the formalities under prevailing laws. The Government of Nepal cancelled its registration as it was closed down without fulfilling the formalities. Do you think the action taken by Government valid?

Answer

Under Sec 24 of Industrial Enterprises Act, If an industry is closed down after fulfilling the formalities as envisaged in the existing laws, information thereof shall have to be provided to the concerned department within seven days from the date of closing down.

Under Sec 25 of the Act (1) Government of Nepal shall take any of the following actions against any person for establishing any industry without obtaining permission required to be obtained under this Act or for

noncompliance with the terms and conditions set forth in the license or certificate of registration or for violating any other provision of this Act:

(a) To impose a fine in an amount not exceeding five hundred thousand rupees,

(b) To cancel the registration or permission of the industry,

(c) To cause to close down the industry;

(2) Before taking any action under sub-section (1), the concerned industry shall be given a reasonable time either to submit the explanation or to correct the mistake.

(3) If any industry is not satisfied with the decision made by Government of Nepal under sub-section (1) above, it may file an appeal to an Appellate Court within thirty five days of the notification thereof.

As per section 25 violation of any other provision of this Act is also an offence. Sec 24 deals with the formalities to be fulfilled before closing down of the industry. Hence the action taken by government is valid.

Labor Act, 2048

15. What are the special provisions which shall apply in respect of the construction business under Labour Act, 2048

Answer

Under Section 46 of Labour Act, the following special provisions shall apply in respect of the construction business.

(a) **Provisions for Construction Tools:** The Proprietor shall have to avail from its own side all necessary tools and material in sufficient quantity for the workers engaged in the construction works at construction site. Explanation: For the purpose of this Section, "construction work" means the construction work of building, road, bridge, canal, tunnel, internal or interstate waterways or railways, or installing of telecommunication equipment or machine including those of electricity, telephone or telegraph or other works relating to construction.

(b) **Special Arrangements at Temporary Construction Sites:** At the temporary construction work sites, where fifty or more workers are engaged, the Proprietor shall have to make arrangements for quarters, food stuffs, drinking water, etc. for the workers who do not have residence nearby.

(c) **Accident Insurance:** The Proprietor shall have to insure all workers engaged in the construction site against accident in the way as prescribed.

(d) **Safety Arrangements:**

(1) The Proprietor shall have to make necessary and adequate arrangements of safety at the sites of construction works.

(2) The Proprietor shall have to arrange of personal protective equipment necessary for the workers engaged in construction works.

Bonus Act, 2030

16. The General Manager of KBC Enterprises submits an application to the Labor office for extension of time limit for payment of bonus mentioning the reasons. The Labour Office permitted the payment of two years bonus in one lump sum during the next fiscal year. Mr. A an employee is punished due to his involvement in illegal strike. The Enterprises declared bonus in the next year as well and denied to pay to Mr. A the bonus of past year as well. Advice Mr. A whether he is eligible to get bonus of the both years?

Answer:

Bonus Act

8. Restrictions on Payment of Bonus

Notwithstanding anything contained in Section 6, any employee who has been punished for any of the following actions, or who has been dismissed from service, shall not be entitled to any bonus under this act.

Provided that nothing contained in this Section shall be deemed to have prejudiced the payment of bonus for the period preceding the action which is so punishable.

- a) Theft of the property of the establishment, or any damage to its property,
- b) Illegal strike, or instigation to others to start such a strike .
- c) Rioting or violation of discipline.

9. Categories of Bonus And Time-Limit for Payment

1. Bonus payable under this act shall be paid in cash.
2. Bonus shall be paid within eight months after the expiry of the fiscal year.
3. In case the General Manager submits an application to the Labor Office mentioning the reasons why bonus can not be paid within the time-limit mentioned in Sub-Section (2), and in case such reasons are considered proper, the Labor Office may extend the time-limit for a maximum period of three months, or permit the payment of two years bonus in one lump sum during the next fiscal year.

On the basis of above provision the time limit of payment of bonus can be extended. If any employee participates in illegal strike, the payment of bonus for the period preceding the action shall be paid. So, bonus of Mr. A for past year cannot be restricted.

Contract Act 2056

17. What are the circumstances where fundamental changes shall not be deemed to have come in the situation prevailing at the time of signing the contract?

Answer

Under Section 79 (3) of Contract Act, Fundamental changes shall not be deemed to have come in the situation prevailing at the time of signing the contract in any of the following circumstances:

- (a) In case it becomes difficult to perform the contract;
 - (b) In case profit margin is low or loss is expected;
 - (c) In case any party to a contract is dependent upon any third party who is not a party to the contract for performing the contract, if the third party commits a mistake or becomes unfit;
 - (d) In the event of strikes and lockouts;
 - (e) In case it becomes necessary to pay additional tax, fee or other revenue;
 - (f) In case the contract has been signed with several objectives and only some of them can not be fulfilled.
- (4) In case it becomes impossible to execute a contract because of fundamental changes in the situation as mentioned in Sub-section (2), action in the following matters shall be taken as follows;
- (a) The amount paid by one party to the other in consideration of the contract before such a change in the situation occurs shall be refunded to the other party. (b) Payment to be made or due from one party to the other in consideration of the contract shall not be made after such a change in the situation.
 - (c) In case any party has performed any work or paid any amount before such a change in the situation, such work or amount shall be calculated and the amount to be paid to each other should be determined, and reasonable expenses incurred by one party in consideration of the contract may be recovered from the other party.
- (5) Notwithstanding anything contained in this Section, after the end of the situation mentioned in Clause (b) of Sub-section (3), the parties to a contract may agree to fulfill their respective obligations by executing the contract.

Insurance Act 2049

18. What are the fundamental principles of Insurance?

Answer

Fundamental principles of insurance:

1) Good faith:

It is a contract based on utmost good faith. If the utmost good faith is not observed by either party the contract may be avoided by the other. Both parties of the insurance contract must be of the same mind (ad idem) at the time of contract. There should not be any misrepresentation, non-disclosure or fraud concerning the material. The insurer will also have to disclose all the material facts. An insurance contract is a contract of Uberrimae fidei i.e. of absolute good faith both parties of the contract must disclose all the material facts and fully. Contract of insurance transfers risk from one party to other. It is most essential that there must be the utmost good faith and frankness (whole truth must be told) between the parties.

2) Insurable interest:

The insurable interest is the pecuniary interest whereby the policy-holder is benefited by the existence of the subject matter and is prejudiced death or damages of the subject matter.

For instance, in the case of life insurance, there is insurable interest to the husband in wife's life, to the wife in husband's life, in marine insurance, to the owner of the ship in the ship, the owner of the cargo in cargo, in the case of fire insurance, to the owner of the property in that property insured and in accident insurance, to the employer in the lives of his workers and officials. In absence of insurable interest, insurance runs into the gambling like an illegal contract.

It is financial interest in the preservation of the subject matter of insurance. A purely sentimental interest or a non monetary benefit will not cause an insurable interest. The assured must have an actual interest i.e. the insurable interest in the subject matter of the insurance. Who may be insured or will be in advantage position.

3) Indemnity:

This principle is applicable to all insurances except the life insurance. The insurance company in return of premium, provides a certain amount as an indemnity. Insurer undertakes to indemnify the insured what he actually loses by the happening of the event. If house is burnt down, the insurer will pay the value of it.

4) Mitigation of loss:

In the event of some mishap to the insured property, the house owner (insured) must act as if he were uninsured, and make every effort to preserve his property. He must act as a prudent uninsured person would do on similar circumstances. But he is not bound to do it at his own peril. So if the insured has done reasonable effort and precautions to save the life or the property, the insurer will be liable for all loss resulting from the peril insured against.

5) Risk:

Contract of insurance can be enforced only if the risk is attached. If the subject matter of insurance ceases to exist (e.g. the goods are burnt) or the insured ship has already arrived safely, at the time the policy is effected, the risk does not attach and as a consequence, the premium paid can be recovered from the insurers because the consideration for the premium has totally failed. So, if the risk is not run and the consideration fails and therefore the premium received by the insurer must be returned.

6) Premium:

The premium is the price for the risk undertaken by the insurer. It is the consideration for the insurance. The premium need not always be a money payment. It is based on the affecting the risk like locality, construction and use of the property. A contract where by one person (insurer) undertakes in return for the agreed consideration called premium to pay another (assure) a sum of money of its equivalent at the happening of a specified event. Premium may vary according to the change in the risk at any time. Premium is the consideration for the risk run by the insurer and if the risk insured against is not run, then the consideration fails, the policy does not attach, and as a consequence the premium paid can be recovered from the insurer. If the insurers have never been on the risk, they cannot be said to have earned the premium.

7) Principle of contribution

This principle is corollary to the principle of indemnity. The main purpose of this principle is to compensate only to the actual loss in the proportion of actual loss and damage incurred. Any person can affect his property with more than one insurance company. If he has made double insurance, he will have right to claim only for the real loss of his property and every insurance company should compensate the real loss on the basis of value that the insurance company insured. Even if there is double insurance, he cannot get the double benefit. Contribution takes place when different insurer insures the same interest in respect of the same property and the same peril.

8) Principle of Subrogation

It refers to the right of the insurer to stand in the place of the insured, after settlement of a claim in so far as the insured's right of recovery from alternative sources is involved. If the insured is in a position to recover the loss in full or in part from a third party due to whose negligence the loss may have been precipitated, his right of recovery is subrogated to the insurer on settlement of the claim. The insurers, thereafter, recover the claim from the third party. The right of subrogation may be exercised by the insurer before payment of loss. This principle applies only to fire and marine insurance. Subrogation means to take other's place. Since doctrine of indemnity is not applicable to life insurance, subrogation does not apply to life insurance.

9) Principle of Proximate Cause

This rule is that immediate and not the remote cause is to be regarded. The real cause must be seen while payment of the loss. If the real cause of loss is insured, the insurer is liable to compensate the loss, otherwise the insurer may not be responsible for loss. If the loss or damage is created by more than one cause, it should be found out which cause is the nearest cause for that event included in the policy. It creates the liability that the insurer should compensate to the loss. If it is the risk out of the policy, certainly the insurer is not compelled to provide the compensation. If there are many causes of the event, insurer should pay attention to the proximity cause.

Negotiable Instruments Act 2034

19. Discuss the presumptions as to Negotiable Instruments under the Negotiable Instruments Act, 2034.

Answer:

Under Section 103 of Negotiable Instrument Act, 2034, until the contrary is proved, the following presumptions shall be made:-

- (a) that every Negotiable Instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed negotiated or transferred, was, accepted, indorsed, negotiated or transferred for consideration in accordance with the prevailing law,
- (b) that every Negotiable Instrument bearing a date was made or drawn on such date,
- (c) that every transfer of a Negotiable Instrument was made before its Maturity,
- (d) that every accepted Bill of Exchange was accepted within a reasonable time after its date and before its Maturity,
- (e) that the Indorsements appearing upon a Negotiable Instrument were made in the order in which they appear thereon,
- (f) that the Holder of a Negotiable Instrument is a Holder in due Course.

Provided that, the burden of proving that the Holder is a Holder in due Course lies upon him/her in the following conditions:-

- (1) Where the Negotiable Instrument has been obtained from its lawful owner or from any person in lawful custody thereof by means of an offence or fraud,
- (2) Where the Negotiable Instrument has been obtained from the maker, Drawer or acceptor thereof by means of an offence or fraud, or for unlawful consideration.

20. A orders B to Pay C. C endorses the bill to D and D endorses it to E. E presents the bill to B for acceptance. E allows B Five days time to consider for acceptance. D did not give consent about giving Five days time to B. B argue that there was two days public holidays between the Five days. What will be the liabilities of the parties? Answer with reference to Negotiable Instruments Act, 2034.

Answer

Under 57 of Negotiable Instruments Act, If the Holder allows the acceptor of a Negotiable Instrument a period of more than two days, exclusive of Public Holiday to consider whether he/she will accept the same, all prior parties not consenting to such allowance are thereby discharged from the liability to such Holder.

Hence, holder of unaccepted bill has to present it to the drawee. The drawee should be given 2 days time to consider whether he will accept the bill or not. The two days time does not include the public holiday if any. If the holder allows more than two days without consent of previous parties, the parties who did not give consent are discharged. Hence in the above case if D does not give consent in giving two 3 additional days, D is discharged from liability. If there is 2 days public holidays, there is still 1 additional day. Hence the argument of E is not valid.

Social Welfare Act, 2049

21. Enumerate the composition of the Social Welfare Council.

Answer

Under Section 5 of the Social Welfare Council Act: (1) The social welfare council has been established to make effective co-ordination, co-operation, mobilization and promotion of the social organizations and institutions, in order to run social activities in more organized way.

(2) The Council consists of the following members:

- (a) The Ministry or the Minister of State responsible for the social welfare work - Chairperson
- (b) One reputed social worker nominated

- Government of Nepal - Vice-chairperson
- (c) One reputed social worker nominated by Government of Nepal - Treasurer
- (d) President, Social Committee, at present Constitutional Assembly - Member
- (e) Member, (responsible for the social service) the National Planning Commission - Member
- (f) Not more than four persons at least one women nominated by Government of Nepal from among the social worker - Member
- (g) Three persons nominated by Government of Nepal from among various social organizations and institutions - Member
- (h) Representative of the relating Ministry responsible for social welfare - Member
- (i) Representative, Ministry of Home Affairs - Member
- (j) Representative, Ministry of Local Development - Member
- (k) Representative, Ministry of Finance - Member
- (l) Representative, Ministry of Health - Member
- (m) Representative, Ministry of Education and Culture - Member
- (n) The person nominated by Government of Nepal - Member-Secretary
- (3) The tenure of the nominated members shall be four years and they may be re-nominated.
- (4) Government of Nepal may make alterations of the council members based on the recommendation with reasons submitted by the Council and is shall be notified in the Nepal Gazette.

WTO and Nepalese Laws

22. Discuss the meaning of Finance Bill as defined by Constitution of Nepal, 2072.

Answer

Under Article 110(3) of Constitution of Nepal “Finance Bill” means a Bill concerning all or any of the following subjects:

- (a) The imposition, collection, abolition, remission, alteration of taxes or regulation of tax system.
- (b) the preservation of the Federal Consolidated Fund or any other Federal Government fund, the deposit of money into and the appropriation or the withdrawal of money from such funds, or the reduction, increment or cancellation of appropriations or of proposed expenditures from such funds.
- (c) the regulation of matters relating to the raising of loans or the giving of guarantee by the Government of Nepal or any matter pertaining to the amendment of the laws concerning financial liabilities undertaken or to be undertaken by the Government of Nepal.
- (d) the custody and investment of all revenues received by any Government fund, money acquired through the repayment of loans and the grant of money, or audit of the accounts of the Government.
- (e) Matters directly related to sub-clause (a), (b), (c) and (d). Provided that a bill shall not be deemed to be a Finance bill by reason only that it provides for the payment of any fees such as license fee, application fee, renewal fee, or it provides for imposition of any penalty or imprisonment.

23. Distinguish between the following.

a) Share and Debenture

Answer

- (i) Shares are a part of the capital of a company whereas debentures constitute a loan.
- (ii) The shareholders are the owners of the company whereas debenture holders are creditors.
- (iii) Shareholders generally enjoy voting right whereas debenture holders do not have any voting right.
- (iv) Interest on debentures is payable even if there are no profits. Dividend can be paid to shareholders only out of the profits of the company.
- (v) Debentures have generally a security on the assets of the company but shares do not carry any such security.
- (vi) The rate of interest is fixed in the case of debentures whereas on equity shares the dividend may vary from year to year.
- (vii) Debentures get priority over shares in the matter of repayment in the event of liquidation of the company.

b) Transfer and transmission of shares

Answer:

Transfer of shares

- 1. It is affected by a voluntary/deliberate act of the parties.
- 2. It takes place for consideration.
- 3. The transferor has to execute a valid instrument of transfer (Deed).
- 4. As soon as the transfer is complete, the liability of the transferor ceases.

Transmission of shares

- 1. It takes place by operation of law e.g. due to death, insolvency or lunacy of a member.
- 2. No consideration is involved.
- 3. There is no prescribed instrument of transfer.
- 4. Shares continue to be subject to the original liabilities.

c) Holder and Holder In Due Course

- 1. The 'holder' of a negotiable instrument means any person entitled in his own name:
 - (i) to the possession thereof, and
 - (ii) to receive or recover the amount due thereon

Holder In Due Course holder in due course means a holder who takes the instrument bona fide for value before it is overdue, and without any notice of defects in the title of the person, who transferred it to him.

- 2. A holder may become the-possessor or payee of an instrument even without consideration, whereas a holder in due course is one who acquires possession for consideration.
- 3. A holder in due course as against a holder, must become the possessor payee of the instrument before the amount thereon become payable.
- 4. A holder in due course as against a holder, must have become the payee of the instrument in good faith i.e., without having sufficient cause to believe that any defect existed in-the transferor's title.