CHARTERED ACCOUNTANCY PROFESSIONAL III
(CAP-III)

Compilation of Suggested Answers
Corporate Laws
(Dec 2003 - Dec 2022)

The Institute of Chartered Accountants of Nepal

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Students are expected to apply their knowledge and write the answer in the examinations taking the suggested answers as guidance.

Due care has been taken to compile the suggested answers. In case students need any clarification, creative feedbacks or suggestions for the further improvement on the material, or any error or omission on the material, they may report to the email education@ican.org.np of the Institute.

May 2023

The Institute of Chartered Accountants of Nepal

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CHAPTER-1

NEPAL CHARTERED ACCOUNTANTS ACT, 2053 & REGULATION, 2061

[Note: All answers suggested hereby have been updated as per Nepal Chartered Accountants Act, 2053 with First Amendment, 2059 and its Regulation, 2061 with its 8th Amendment, 2075]

Question No.: 1

Define the cooling off period for the engagement team members and what are the restrictions on activities during the cooling off period to the engagement team member in an audit according to the code of ethics of members of ICAN. **(December 2022) (7 Marks)**

Answer:

Code of Conduct of the Institute of Chartered Accountants of Nepal has defined the cooling off period to the professional accountants as follows:

i If the individual acted as the engagement partner for seven cumulative years, the cooling-off period shall be five consecutive years.

ii. Where the individual has been appointed as responsible for the engagement quality control review and has acted in that capacity for seven cumulative years, the cooling-off period shall be three consecutive years.

iii. If the individual has acted as a key audit partner other than in the capacities set out as above (i) & (ii) for seven cumulative years, the cooling-off period shall be two consecutive years.

If the professional accountant has provided the services in a combination of key audit partner roles, then the cooling off period will be as follows:

i If the individual acted in a combination of key audit partner roles and served as the engagement partner for four or more cumulative years, the cooling-off period shall be five consecutive years.

ii Subject to paragraph R540.16(a), if the individual acted in a combination of key audit partner roles and served as the key audit partner responsible for the engagement quality control review for four or more cumulative years, the cooling-off period shall be three consecutive years.

iii. If an individual has acted in a combination of engagement partner and engagement quality control review roles for four or more cumulative years during the time-on period, the cooling-off period shall:

a) As an exception to paragraph R 540.15 be five consecutive years where the individual has been the engagement partner for three or more years; or

b) Be three consecutive years in the case of any other combination.

iv. If the individual acted in any combination of key audit partner roles other than those addressed in paragraphs R540.14 to R540.16, the cooling-off period shall be two consecutive years.

Service at a Prior Firm

R540.18 In determining the number of years that an individual has been a key audit partner as set out in paragraph R540.5, the length of the relationship shall, where relevant, include time while the individual was a key audit partner on that engagement at a prior firm.

Shorter Cooling-off Period Established by Law or Regulation

R540.19 Where a legislative or regulatory body (or organization authorized or recognized by such legislative or regulatory body) has established a cooling-off period for an engagement partner of less than five consecutive years, the higher of that period or three years may be substituted for the cooling-off period of five consecutive years specified in paragraphs R540.11, R540.14 and R540.16(a) provided that the applicable time-on period does not exceed seven years.

Restrictions on Activities During the Cooling-off Period

R540.20 For the duration of the relevant cooling-off period, the individual shall not:

(a) Be an engagement team member or provide quality control for the audit engagement;
(b) Consult with the engagement team or the client regarding technical or industry-specific issues, transactions or events affecting the audit engagement (other than discussion with the engagement team limited to work undertaken or conclusion reached in the last year of the individual's time on period where this remains relevant to the audit)
(c) Be responsible for leading or coordinating the professional services provided by the firm or a network firm to audit client, or overseeing the relationship of the firm or a network firm with the audit client; or;
(d) Undertake any other role or activity referred to above with respect to the audit client, including the provision of non - assurance services that would result in the individual
(e) Having significant or frequent interaction with senior management or those charged with governance,

Question No.: 2

RB Seth, an articled clerk of ZY Associates, desires to leave the articleship from his principal due to some misunderstanding between the principal and RB Seth. Nepal Chartered Accountant Regulations, 2061 has provided such option to the articled clerk to get resigned and to join to another chartered accountant firm. Explain the various reasons how the training of the articled clerk ended or seized under this rule. **(June 2022) (6 Marks)**

Answer:

Rule 33 of The Nepal Chartered Accountants Rules, 2061 has provided the conditions when the training of an articled clerk is terminated. The provisions are as follows:

1. The agreement as per sub rule (2) of Rule 24 between the principal and articled clerk shall be ended any time with the mutual understanding between the parties.
2. If the agreement between the two parties ended, the matter signed by both parties shall be informed to the Institute of Chartered Accountant within 7 days of the events occurred.
3. The articled clerk who has ended the article clerk from one principal shall arrange another articled clerk training with another principal for the remaining period. The articled clerk (trainee) shall formally be registered with such article clerk formally.
4. The principal has authority to initiate the termination of the articled clerk training if the trainee is absent for a period of 15 or more days without informing the principal and shall initiate to terminate the articled clerk training and shall write the letter to the Institute.
5. The Institute shall investigate the matters and if the application to terminate the articled clerk training is justified, the Institute shall terminate the articled clerk training from the applicant principal.
6. The principal after the termination of the existing articled clerk from his audit firm, there will be the vacancy of articled clerk under his principal.
7. Notwithstanding anything mentioned above rules, the principal with the prior approval from the Institute and the articled clerk with the one-month prior notice may terminate the articled clerk training from that audit firm where he/she was getting training.

Question No.: 3

Three years ago, Mr. 'A', a council member of Institute of Chartered Accounts of Nepal was imprisoned for 2 years convicted in a fraud case. After his requited, he attended in a meeting and decided to publish CAP III results of year 2021, July session. The result published is questioned as invalid, on the grounds of disqualification of members and the circumstances that the council member ceases to hold office. Examine the validity of the results published pursuant to the Nepal Chartered Accounts Act, 2053. **(December 2021) (5 Marks)**

Answer:

Disqualification for membership registration:

The following person shall not be deemed to be qualified to be enrolled as a member of the Institute pursuant to section 18 of Nepal Chartered Accountants Act, 2053:

(a) One who has not the qualification referred to in Sub-sections (2) and (3) of Section 16 of this Act;

(b) One who has not attained the age of Twenty One years;

(c) One who has become insolvent being unable to repay loan to creditors;

(d) One who has been convicted by the court of a criminal offence involving moral turpitude;

(e) One who is of unsound mind.

Circumstance where a council member ceases to hold office:

As per Section 8

A council member shall cease to hold his or her office in any of the following circumstances:

(a) If the council member ceases to be a member of the Institute,

Provided that, this provision shall not be applicable to the nominated council member;

(b) If resignation tendered by the council member from his or her office is accepted by the Council;

(c) If the council member absents himself or herself from three consecutive meetings of the Council without giving a notice with reason to the Council;

(d) If the term of office of the council member expires;

(e) If it is proved that the council member has not abided by the conduct referred to in Section 34;

(f) If the council member dies.

While tendering resignation pursuant to Clause (b) of Subsection (1), the president shall tender it to the vice-president and the other council members, to the president.

Act and action not to be invalid:

Mr. A has been convicted in a fraud case which is regarded as an offence of moral turpitude. So, he is disqualified and ceases to be a council member.

Section 12 has provided that in cases where any act and action has been done in pursuance of a decision of the Council when the seat of any council member is vacant or a person who has not possessed such qualification as required to become a council member has been elected or nominated as the council member, such act and action already done shall not be invalid by that only reason. Therefore, the publication of results of CAP III is valid. However, it could be a case if will be violation of law, and resulting a case of contempt of Court.

Question No.: 4

Mr. Krishna Gopal, a practicing auditor and a member of ICAN, published a compilation of all the existing audit principles of various sectors. While publishing the compilation he gave his personal resume and details as one of the leading auditor in respect of his professional experience of an auditor and his present association as a partner with Krishna & Associates, a renowned audit firm. Answer the followings:

i) Whether the details given by Mr. Krishna Gopal is a violation of the code of conduct as prescribed by the Nepal Chartered Accountant Act, 2053.

ii) Whether he can be penalized?

(December 2021) ***(4+3=7 marks)***

Answer:

Mr. Krishna Gopal, as a member of ICAN has to fully abide by the NCA Act, 2053 and the Regulations, 2061 of it. As to the profession of auditor it has been prescribed mandatory duties of an auditor.

(i) In the given context, publishing a compilation regarding the existing audit principles of various sectors is an act of promoting professional job and is not a violation of the code as prescribed by the Act. However, publishing the personal details regarding the professional experience of an auditor is a kind of violation of code of conduct of the Act. Chapter VIII of the Nepal Chartered Accountants Act, 2053 prescribes provision regarding conducts that are to be fully observed by the Members. One of the conducts prescribed by the Act is that members should not disclose or divulge any information and explanations acquired in the course of professional service to any person other than the employer employing him and the person whom he is compelled by the law to do so. The Act further prescribes that members should not directly or indirect influence any person by way of enticement in order to secure any professional business. Finally it is the duty of a member to abide by all other matters concerning the conduct in the course of his profession. In the given issue it is clear that publishing personal details claiming as one of the leading auditors and his professional experience of an auditor is a violation of the code prescribed by the Act and liable for it.

(ii) One of the prime functions of the Council of the Institute is to monitor as to whether or not the members and members holding certificate of practice have acted in conformity with the prescribed professional code of conduct. In the given issue it is clear that Mr. Krishna Gopal has violated code of conduct prescribed by the NCA Act, 2053 by giving his personal details regarding professional experience of an auditor and his present association as a partner with an audit firm. In such case if a member of ICAN lodges a complaint to the Institute against such member in respect of not upholding the conduct mentioned under section 34 (4) and (5) of the Act, an action can be taken against such member by the

Institute and the member so violated will liable to be punished for committing an act contrary to the provision of NCA Act or Regulation Pursuant to sections14 (5) and 22 (1) of this Act.

Question No.: 5

What are the conducts a member and COP holder of ICAN must observe as to doing partnership with another member, sharing audit fees, disclosing clients' information, attention to the material facts and the procedure of appointment of another member?

(June, 2021) (5 marks)

Answer:

Every member and member holding COP of ICAN should observe certain conducts as provided under section 34 of Nepal Chartered Accountants Act, 2053. It is a mandatory provision against every member and member holding COP of ICAN. Following are the conducts required to be observed as per the question:

As per section 34 (2) one should do partnership or work in collusion only with a member of his own class.

As per section 34 (3) one should share audit fee only with a member of the institute.

As per section 34 (5) one should disclose any information of the clients acquired during professional services only to his employer or the person who is legally allowed to get such information.

As per section 34 (8) and (9) in order to truly present the financial statement certified by him, one should clearly state all the material facts known to him or to the best of his knowledge. And also, he should draw attention of all concerned to such material facts which are or have taken place contrary to the prevailing law and do not comply with generally accepted principles of auditing.

As per section 34 (13) one will accept his appointment as an auditor of an organization only after ascertaining that all required procedures for appointment as the auditor under the prevailing law has been duly fulfilled.

Question No.: 6

Mr. Kapil, a member of the council of ICAN, removed from the seat by reason of non-compliance of code of conduct. He consults you that the removal of member from the council is valid or not. State the provisions of code of conduct by which a member can be removed from the seat and how the vacancy of member is fulfilled if so removed?

(June, 2021) (7 marks)

Answer:

The matters to be observed the Conduct has mentioned in the Section 34. The matters include following:

(1) Members and members holding Certificate of Practice shall fully abide this Act and the Regulations framed under this Act.

(2) Auditing, either in partnership or in collusion in any manner with a person who has not obtained the Certificate of Practice of one's class, is prohibited.

(3) One shall not share or distribute as profit the auditing fees or remuneration with any person other than a member of the Institute; and shall not pay any commission, brokerage etc. out of the professional fees earned to any person or member.

(4) One shall not, directly or indirectly, influence any person by way of fear, threat, terror or enticement in order to secure any professional business.

(5) One shall not disclose or divulge any information and explanations acquired in the course of professional service to any person other than the employer employing him and the person whom he is complied by the law to do so.

(6) Members holding Certificate of Practice shall not certify any financial statement or give report of any type until they or their partner or employee checks and verifies it.

(7) Member holding Certificate of Practice shall, while certifying financial statements or making report thereon of any corporate body in which he or his partner has interest, clearly mention the extent of his or his partner's interest therein. Provided that being merely a shareholder in a company shall not be deemed to have interest therein.

(8) Member holding Certificate of Practice shall, in order to truly present the financial statement certified by him, clearly indicate all the material facts or any false statements or explanations known to him or to the best of his knowledge.

(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.

(10) Members holding Certificate of Practice shall not base their remuneration as a percentage on the profit or on any other uncertain results.

(11) One shall not knowingly or recklessly mention any false matter in a notice, explanation or statement required under the prevailing law to be provided to any office, department of the Government of Nepal or any organization.

(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.

(13) A member holding Certificate of Practice shall not accept his appointment as an auditor of an organization without ascertaining that all required procedures for appointment as the auditor under the prevailing law has been duly fulfilled.

(14) One should have obtained sufficient information prior to give audit opinion.

(15) Other matters concerning the conduct to be observed by the members and members holding Certificate of Practice shall be as prescribed.

Section 8 of the ICAN Act has been provided the grounds of the removal from member of the Council. Among the grounds, the non-compliance with the code of conduct as referred in the section 34 is one. If it is questioned that any member of council has not fulfilled the said conduct and it is verified so, then he/she may be removed from the member of the council. In instance case, it is valid due to non-compliance of code conduct. Vacancy is fulfilled by following measures as provided in the section 9:

(1) The Council shall, if any seat of any Council member elected pursuant to clause (a) or (b) of sub-section (3) of Section 7 turns vacant due to death or resignation or disqualification to continue as a member of the Institute pursuant to the other provisions of this Act, designate any member as Council member for the remaining term of office, provided the remaining period of such vacated office is of less than a year; and if such term is of more than a year, the vacancy shall be filled through election.

(2) A seat, falling vacant owing to death or resignation of any Council member, nominated pursuant to clause (c) of sub-section (3) of Section 7, shall be fulfilled, for the remaining term of office, as per the procedure set forth in the same section.

Question No.: 7

Mr B is one of the nominees of Government of Nepal to the Council of the Institute of Chartered Accountants of Nepal. As he assumes the post, he wants to get acquainted with functions, duties and power of council. Suggest him the major functions, duties and power of Council under the Nepal Chartered Accountants Act, 2053?

(Dec, 2020) (8 marks)

Answer:

Section 11 of Nepal Chartered Accountants Act, 2053 mentions about the functions, duties and power of Council which are as follows:

(a) To conduct examinations of candidates who join the accountancy.
(b) To determine the procedures in relation to the membership of the Institute and registration of name as a member having obtained professional certificate.
(c) To provide a person who holds the required qualification with an appropriate type of membership of the Council pursuant to Section 16 of this Act.
(d) To make coordinative development of the accountancy by having maximum utilization of the available means and resources.

(e) To determine the qualification required for efficient human resources for the development of the accountancy.
(f) To determine the type of curriculum and practical training required to pursue the qualification necessary for obtaining the membership.
(g) To carry out different teaching and training programs in cooperation with any university or other educational institute or by the Institute itself.
(h) To grant the professional certificate to the members for carrying on the accountancy.
(i) To enhance the capacity of members by providing them with career development opportunities.
(j) To monitor as to whether or not the members or members having obtained the professional certificate have acted in conformity with the professional code of conduct prescribed for the members or members having obtained the professional certificate.
(k) In accordance with the recommendation of the disciplinary committee, to take necessary action against any members and members having obtained the professional certificate for their acts and actions in contravention of the professional code of conduct.
(l) To give theoretical or practical directions and guidelines in various aspects of the accountancy and auditing and carry out other functions as may be necessary for the professional development.
(m) To observe, or cause to be observed, accounting standards and standards on auditing provided or recommended by the Accounting Standards Board and Standards on Auditing Board, and to regulate whether such standards have been observed or not.
(n) To safeguard and promote the rights, interests and reputation of the members.
(o) To render advice and suggestion to Government of Nepal for the improvement of the various laws in force in the fields related with industry, commerce, finance, revenue and accountancy.
(p) To accept membership of the International Federation of Accountants, and regional and sub-regional federations, and establish contact with the accountant institutes of other countries.
(q) To recommend appropriate educational standards for accounting education in coordination with universities and other educational institutes.
(r) To conduct necessary trainings, symposia and seminars in order to enhance professional efficiency of the registered auditors.
(s) To conduct short term or long term trainings, symposia etc. for the benefit of accountancy human resources in service.
(t) To publish materials relating to the accountancy.
(u) To operate a library relating to the accountancy.
(v) To determine the procedures to be followed by the committees to be formed by the Council.
(w) To approve the budget of the Institute and manage the funds.
(x) To appoint such employees as may be required for the Institute and prescribe their remuneration and other facilities.

(y) To provide on-going professional education for members.
(z) To develop educational system in order to prepare account technicians and do necessary acts pertaining thereto.
(a1) To carry out such other functions as are prescribed by this Act or the Rules and Bye-laws framed under this Act.
(a2) To carry out such other functions as may be necessary for the attainment of the objectives of this Act.

Question No.: 8

The Institute of Chartered Accountants of Nepal (ICAN) received a complaint against Mr. Nilam Sharma, a member of ICAN alleging that he conducts audit in partnership with a person called Rabi Singh who has not obtained a certificate of practice of his class, hence, a complaint filed against him. Answer the following questions pursuant to the Nepal Chartered Accountant Act, 2053.

i) How the complaint shall be processed by ICAN?
ii) What action can ICAN take against him?

(Dec, 2019) (4+3=7 marks)

Answer:

Pursuant to section 35 of Nepal Chartered Accountants Act, 2053, where a member having obtained the professional certificate does not observe the code of conduct set forth in this Act or the Rules framed under this Act or such member violates this Act or the Rules framed under this Act, the concerned person may make a complaint to the ICAN against such member. In pursuance to section 35 of the above Act a complaint has been filed to ICAN against Mr. Nilam Sharma, a member of ICAN with the allegation that he conducts audit in partnership with a person called Rabi Singh who has not obtained a certificate of practice of his class, which is a prohibited act under section 34(2) of this Act. Pursuant to this section 34(2), auditing, either in partnership or in collusion in any manner with a person who has not obtained the certificate of practice of one's class, is prohibited.

Pursuant to section 35(2) of this Act, where there is found a fact to believe that a member having obtained the professional certificate has not observed the conduct required to be observed, the Executive Director shall submit a motion, accompanied by the available facts, to the Council of ICAN for taking action against such member. Thereupon, the Council of ICAN shall forward the complaint filed under Nepal Chartered Accountants Rules, 2061 to the Disciplinary Committee for investigation.

Pursuant to section 14(1) of this Act, there is a Disciplinary Committee constituted under Section 14 of this Act, to inquire into a complaint and recommend to the Council of ICAN for necessary action.

The procedures of Disciplinary Committee are as prescribed in the Rules framed under the Act. The Disciplinary Committee shall have the same powers as are vested in the court in respect of

issuing an order to the concerned person, receiving evidence and examining witnesses. Pursuant to section 14(5) of this Act, the Disciplinary Committee shall make recommendation, alongwith its opinion and finding, to the Council of ICAN for taking necessary action against the member found guilty from its investigation; and the Council of ICAN may, in view of such recommendation, impose any of the following penalties on the concerned member, according to the gravity of the offence:

(a) Reprimanding;

(b) Removing from the membership for a period not exceeding five years;

(c) Prohibiting from carrying on the accountancy for any specific period;

(d) Cancelling the certificate of practice or membership.

Hence, the Council of ICAN shall take a decision to take appropriate action based on the above recommendation against Mr. Nilam Sharma if the Disciplinary Committee finds him guilty violating the code of conduct of ICAN.

Before imposing penalty as referred to in Sub-section (5) above, the Council of ICAN shall provide a reasonable opportunity to him to defend himself. If he is not satisfied with the decision made by the Council of ICAN to punish him, he can make an appeal to the concerned High Court pursuant to section 14(8) of this Act.

Question No.: 9

Mr. Bikash Bhattarai, a member of ICAN signed the minute of Board of Directors of Kathmandu Microfinance. He has signed the minute in the capacity of a Chartered Accountant. Later, the minute is questioned for its being illegal because Mr. Bikash Bhattarai is alleged to have signed the minute book of the Board of Directors of Kathmandu Microfinance, thus violating the code of conduct of ICAN. Explain the power of the Disciplinary Committee in regard to investigation against the violation of the code of conduct of ICAN pursuant to Nepal Chartered Accountants Act, 2053.

(December, 2018)(7 Marks)

Answer:

The Code of Conduct issued under Nepal Chartered Accountants Act, 2053 is binding to all the members of ICAN. Section 34 of this Act has enumerated the various code of conducts. The following code of conducts was attractive to Mr. Bikash Bhattarai, which he could not complied with:

(1) Members and members holding Certificate of Practice shall fully abide by this Act and the Regulations framed under this Act.

(2) One shall not disclose or divulge any information and explanations acquired in the course of professional service to any person other than the employer employing him and the person whom he is compelled by the law to do so.

(3) Member holding Certificate of Practice shall, in order to truly present the financial statement certified by him, clearly indicate all the material facts or any false statements or explanations known to him or to the best of his knowledge.

(4) 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 taken place contrary to the prevailing law and do not comply with generally accepted principles of auditing.

(5) A member holding Certificate of Practice shall not accept his appointment as an auditor of an organization without ascertaining that all required procedures for appointment as the auditor under the prevailing law has been duly fulfilled.

(6) One should have obtained sufficient information prior to giving audit opinion.

Section 14 of Nepal Chartered Accountants Act, 2053 confers following powers to the Disciplinary Committee of ICAN:

(1) A Disciplinary Committee shall be constituted to recommend to the Council of ICAN to take necessary actions after investigation upon complaints lodged against ICAN who committed action, contrary to this code of conduct framed under this Act.

(2) The Disciplinary Committee shall have the authority, similar to a judicial court, in respect of summoning concerned person and investigating evidences and witnesses.

(3) The Disciplinary Committee shall recommend to the Council, along with its opinion and finding, for necessary action against a member, if found guilty, and the Council may, considering such a recommendation, impose any of the following punishment according to the degree of offense:-

a) Reprimanding,

b) Removing from the membership for a period up to five years,

c) Prohibiting from carrying on the accounting profession for any particular period,

d) Cancellation of the Certificate of Practice or membership.

Question No.: 10

Mr. Gopal K. Sharma, a practicing auditor and a member of ICAN, published a compilation of all the existing audit principles of various sectors. While publishing the compilation, he gave his personal resumes and detail as one of the leading auditor in respect of his professional experience of an auditor and his present association as a partner with M & Associates. Answer the following questions in the given issues:

i) Examine whether the details given by Mr. Gopal K. Sharma is a violation of the code of conduct as prescribed by the Nepal Chartered Accountants Act, 2053?

ii) If there is violation of code of conduct to what extent Mr. Gopal K. Sharma can be penalized?

(June, 2018) (6 Marks)

Answer:

i) Section-34 of Nepal Chartered Accountants Act, 2053 prescribes about code of conduct to be mandatorily complied with by members of The Institute of Chartered Accountants of Nepal (ICAN). Hence, Mr. Gopal K. Sharma, being a member of ICAN, has to be fully abided by those code of conducts mandated by the Act.

One of the code of conducts prescribed by the Act under sub-section (5) of afore stated section 34 is that members should not disclose or divulge any information and explanations acquired in the course of professional service to any person other than the employer employing him and the person whom he is compiled by the law to do so. In addition, as prescribed in its sub-section (4) of the same section that members should not directly or indirectly influence any person by way of enticement in order to secure any professional business. Finally, it is the duty of a member to be abided by all other matter concerning the conduct in the course of his profession.

In the given context, publishing a compilation regarding the existing audit principles of various sectors is an act related for promoting the entire audit professionalism, not his personal professional business and hence it is not a violation of the code of conduct as prescribed by the Act. However, publishing the personal detail regarding the professional experience of an auditor is a kind of violation of afore stated code of conduct of the Act as it seems to influence other persons by disclosing his seniority in the profession and attracting potential clients towards his associated audit firm as mentioned thereof.

Hence, in the given issue, it is clear that the publishing the personal details as one of the leading auditor and his professional experience of an auditor is a violation of code prescribed by the Act and thus liable for disciplinary action prescribed under section-14 of the Act.

ii) One of the prime functions of the Council pursuant to section-11 of NCA Act, 2053 is to monitor whether or not the members and members holding certificate of practice have acted in conformity with the prescribed professional code of conduct and if it finds their acts and actions done in contravention of the professional code of conduct, to initiate actions, in accordance with the recommendation of the Disciplinary Committee, against members holding Certificate of Practice.

In the given context, pursuant to section 14 of the Act, the disciplinary committee investigates upon the complaint lodged against Mr. Gopal K. Sharma, a member holding certificate of practice, regarding the violation of code of conduct. The committee shall have the authority, similar to a judicial court, in respect of summoning concerned person and investigating evidences and witnesses. After investigation, it shall recommend to the Council, along with its opinion and finding, for necessary action against a member, if found guilty, and the Council may, considering such a recommendation, impose any of the following punishment according to the degree of offense:-

a) Reprimanding,
b) Removing from the membership for a period up to five years,
c) Prohibiting from carrying on the accounting profession for any particular period, or

d) Cancelling Certificate of Practice or membership.

Before imposing afore stated punishment, the Council shall provide reasonable opportunity to Mr. Gopal K. Sharma to submit his clarification for defense. After imposing punishment, the concerned member may, if he is not satisfied with the decision of the council, file an appeal in the High Court.

Question No.: 11

CA Saransa Dasnami did not mention the fact in his report that his partner CA Akhil Jirel is one of the creditors holding 45% share of the total credit of his audit client Probio Pvt. Ltd. Can he be said to have not observed the code of conducts? Through a light on the range of punishment that may be imposed on him, if you think that he has violated the code of conduct.

(June, 2016)(5 Marks)

Answer:

Section 34(7) of Nepal Chartered Accountants Act, 2053, requires a member, while certifying any financial statements or making reports thereon of an organization in which he or she or his or her partner has interest, to clearly disclose that he or she or his or her partner has such interest. The exception to this requirement is that where he or she or his or her partner is merely a shareholder of the company, it shall not be deemed to have an interest.

In the given case, CA Akhil, who is a partner of CA Saransa Dasnami, has interest on Probio Pvt. Ltd. as a creditor possessing substantial portion of the total credit. CA Saransa Dasnami failed to disclose this on his report and hence has violated the code of conduct.

Following is the range of punishment that may be imposed on CA Saransa Dasnami for violation of code of conduct as provided for in section 14(5) of the Act:

a. Reprimanding;
b. Removing from the membership for a period up to 5 years;
c. Prohibiting from carrying on the accounting profession for any particular period; and
d. Cancellation of the Certificate of Practice or membership.

The punishment will depend on the degree of offence. The council takes decision upon receipt of the recommendation from the Disciplinary Committee.

Question No.: 12

Chairperson of the Council of The Institute of Chartered Accountants of Nepal is not taking initiation to call meeting for a substantial period of time despite there being important matters to be discussed. Is there any scope in the law that the councilor(s) can demand to call a council meeting?

(June, 2016)(5 Marks)

Answer:

Pursuant to Section 10 (1) of Nepal Chartered Accountants Act, 2053, the Executive Director convenes the meeting of the Council on such date and at such time and place as may be directed by the chairperson. The Council shall generally meet six times a year, and the interval between the two consecutive meetings shall not be more than three months. If the chairperson makes unreasonable delay to convene the meeting or if in the opinion of the councilor, the meeting should be convened, twenty five percent councilors of the total number of councilors may make an application in writing to the chairperson that it is necessary to convene a meeting of the Council. In such case, the chairperson should direct the Executive Director to convene a meeting of the Council within fifteen days of such application.

In the given case, the chairperson of the Institute of Chartered Accountants of Nepal is not taking initiation to call a meeting of the Council for a substantial period of time. The fact given in the question does not specify the time elapsed for the meeting. However, the chairperson has no choice but to give instruction to the Executive Director upon receipt of a call request by the twenty five percent or more of the councilors so request for irrespective of that the chairperson may have complied with the requirement of Section 10 (2) of the Act which provides that there should usually be 6 meetings in a year in the interval of less than 3 months of any 2 meetings.

Question No.: 13

Explain in brief the different types of threats that may be faced by a professional accountant while performing his/her duties.

(December, 2015)(5 Marks)

Answer:

Following specific threats may be faced by a professional accountant while performing his/her duties.

The circumstances in which professional accountants operate may create specific threats to compliance with the above fundamental principles.

Threats may be created by a broad range of relationships and circumstances. Threats fall into one or more of the following categories:

a) Self - interest threat - the threat that a financial or other interest will inappropriately influence the professional accountant's judgment or behavior;
b) Self - review threat - the threat that a professional accountant will not appropriately evaluate the results of a previous judgment made or service performed by the professional accountant, or by another individual within the professional accountant's firm or employing organization, on which the accountant will rely when forming a judgment as part of providing a current service.
c) Advocacy threat- the threat that a professional accountant will promote a client's or employer's position to the point that the professional accountant's objectivity is compromised;

d) Familiarity threat - the threat that due to a long or close relationship with a client or employer professional accountant will be too sympathetic to their interest or too accepting of their work; and
e) Intimidation threat- the threat that a professional accountant will be deterred from acting objectively because of actual or perceived pressures, including attempts to exercise undue influence over the professional accountant.

Question No.: 14

As provided under the "code of ethics for professional accountants" engaged in public practice, what kinds of activities are considered as management responsibilities?

(December, 2015) (5 Marks)

Answer:

Management responsibilities involve leading and directing an entity, including making significant decisions regarding the acquisition, deployment and control of human, financial, physical and intangible resources.

Whether an activity is a management responsibility depends on the circumstances and requires the exercise of judgment. Examples of activities that would generally be considered as management responsibilities include:

- Setting policies and strategic direction
- Directing and taking responsibility for the actions of the entity's employees.
- Authorizing transactions.
- Deciding which recommendations of the firm r other third parties to implement.
- Taking responsibility for the preparation and fair presentation of the financial statements in accordance with the applicable financial reporting framework, and
- Taking responsibility for designing, implementing and maintaining internal control.

Activities that are routine and administrative, or involve matters that are insignificant, generally are deemed not to be a management responsibility. For example, executing an insignificant transaction that has been authorized by management or monitoring the dates for filing statutory returns and advising an audit client of those dates is deemed not to be a management responsibility. Further, providing advice and recommendations to assist management in discharging its responsibility is not assuming a management responsibility.

Question No.: 15

What are the conducts a member and COP holder of ICAN must observe as to doing partnership with another member, sharing audit fees, disclosing clients' information, attention to the material facts and procedure of appointment?

(June, 2015) (5 Marks)

Answer:

Every member and member holding COP of ICAN shall observe certain conducts as provided under section 34 of Nepal Chartered Accountants Act, 2053. Following are the conducts as required in the question:

- As per section 34 (2) one shall do partnership or work in collusion only with a member of his own class.
- As per section 34 (3) one shall share audit fee only with a member of the institute.
- As per section 34 (5) one shall disclose any information of the clients acquired during professional services only to his employer or the person who is legally allowed to get such information.
- As per section 34 (8) and (9) in order to truly present the financial statement certified by him, one shall clearly state all the material facts known to him or to the best of his knowledge. And also, he shall draw attention of all concerned to such material facts which are or have taken place contrary to the prevailing law and do not comply with generally accepted principles of auditing.
- As per section 34 (13) one shall accept his appointment as an auditor of an organization only after ascertaining that all required procedures for appointment as the auditor under the prevailing law has been duly fulfilled.
- It is also required to inform the previous auditor in this respect as per the Code of Ethics.

Question No.: 16

How is the fund of the Institute of Chartered Accountants of Nepal created and operated? Answer it in the light of Nepal Chartered Accountants Act, 2053. How the audit of accounts of the Institute of Chartered Accountants of Nepal is conducted?

(December, 2014)(5 Marks)

Answer:

The Fund of ICAN is created under section 36 of Nepal Chartered Accountants Act, 2053 as under:

1) The ICAN shall have a separate fund of its own; and the fund shall consist of the following amounts:
    a) Grants received from Government of Nepal;
    b) Amounts received from international or foreign organizations or institutions; ICAN should obtain prior approval from the Government of Nepal in this case.
    c) Amounts received while registering the names of members of ICAN or issuing the professional certificates;
    d) Amounts earned from the movable and immovable properties of ICAN;
    e) Amounts received by ICAN from other sources.
2) All amount to be received by ICAN shall be credited to an account to be opened with any commercial bank within Nepal.

3) All expenditures to be incurred by ICAN shall be chargeable on the fund as referred to in sub-section (1) above of this section.
4) Specific Fund should be spent on the same purpose only.
5) The Executive Director shall make expenses chargeable on the fund subject to the control and supervision of the Council of ICAN.
6) The account of ICAN shall be operated as prescribed by its Council.

Pursuant to section 37 of this Act:

1) The accounts of the incomes and expenditures of ICAN shall be maintained in the format as prescribed by its Council.
2) The accounts of ICAN shall be audited by a designated member having obtained the professional certificate.
3) Government of Nepal may, if it so wishes, inspect, or cause to be inspected, any documents relating to the accounts of ICAN at any time.

Question No.: 17

Ms. Anamika Himali, a member of ICAN found that her fellow member Rakami Pahadi, while performing his professional works, has acted against the act or rules or code of conduct and she filed a complaint against him. How will the process of investigation advance and how will the Council act up on the same?

(December, 2014)(5 Marks)

Answer:

Complaints, investigations and reports are provided under section 35 of Nepal Chartered Accountants Act, 2053 and Rules 80-84 of Nepal Chartered Accountants Regulations, 2061 are as follows:

Rule 80 has given the authority for filing the complaint as:

Any member or a person can file a complaint attaching available facts against the member who according to his/her thinking is against the act or rules set up under it or the code of conduct with a fee of RS. 100/.

Rule 81 has given the authority for investigation on a complaint as:

1) The ICAN shall forward a complaint filed under rule 80 to Disciplinary Committee.
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 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 apparent punishment if the allegation is proved.
3) The alleged member or accounting firm notified according to sub-rule (2) shall have to reply pertinently within the bound period.
4) If felt essential by the disciplinary committee a copy of the reply received according to sub-rule (3) shall be sending 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 bound period with evidences (if any) supporting the claim or allegation.
6) After receiving a response according to sub-rule (5), a copy of it is 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 detailed documents of information under sub-rule (7) the concerned complainer or the member or the accounting 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 firm and such complainer or member or partner can defend himself/herself or appointing a legal adviser.
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 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 set up its procedures of their own if felt logical.
    But the procedures applied shall have to be explained in the report in this concern.
    As per Rule 82, the alleged member or a partner/employee of the alleged accounting firm or their relatives cannot participate the meeting of the Disciplinary Committee even if he/she is the member of the committee.

As per Rule 84 report to be submitted to the council as follows:

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 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 recommendation to do so by the disciplinary committee.
    a) The council shall inform the complainer and order to replete the complaint if recommended to do so by the disciplinary committee.
    b) The council sending the alleged member or accounting 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 advisor if the disciplinary committee in its report has recommended an action. After receiving a reply from the alleged member or accounting 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 clause (b) if a member of an accounting firm is found guilty the council shall order punishment in accordance with sub-section (5) of section 14 of the Act.

In the given case, Ms. Anamika Himali, being a member of the ICAN has right to file a complaint against Mr. Rakami Pahadi, another member in a situation where he did not follow provisions of the Act, rules and code of conducts while performing his professional works and the Council and the Disciplinary Committee shall proceed the matter as mentioned above.

Question No.: 18

Mr. Nainawasti is a member of Nepal Accounting Standard Board. He was absent in the fourth and fifth meetings of the Board. He was again absent in the eighth, ninth and tenth meetings in the same year without any information. Can he still retain his seat as a member of the Board?

(December, 2013)(5 Marks)

Answer:

As provided under section 15C of Nepal Chartered Accountants Act, 2053 the seat of any member of Accounting Standards Board shall not be retained on any of following conditions:

(a) If resigned,
(b) If remained absent for three consecutive board meetings without any information,
(c) If convicted and penalized by the court in a criminal offense,
(d) If declared insane,
(e) If declared insolvent,
(f) If dead,
(g) In case of members of the Institute, if the name is removed from the membership register pursuant to Section 22 of the Act.

In the given case, Mr. Nainawasti was absent in the board meeting for five times in the same year, once two times consecutively and next three times consecutively.

Since he has been absent for three times consecutively his right to retain the seat can be challenged and he can be removed from the board.

Question No.: 19

Answer the following questions.

PG Ltd., who appointed Dhan Singh, a C.A. Member holding Certificate of Practice as its auditor, lodged a complaint against him to the ICAN charging that the auditor disclosed a business-related information acquired by him in the course of professional service without his approval to his rival which prejudiced his business interest.

a) Explain how the complaint will be processed by ICAN.
b) Who will investigate the complaint?
c) If after investigation, Dhan Singh is found guilty then what punishment(s) can be imposed against him under Nepal Chartered Accountant Act, 2053?

d) Whether Dhan Singh has any option left with him to challenge the punishment imposed against him?

(June, 2013)(4+3+2+1=10)

Answer:

a) Section 34(5) of Nepal Chartered Accountants Act, 1997, requires that no CA member shall supply or disclose any information and explanation which he or she has got in the course of his or her business to any person other than the person who employs him or her and the person whom he or she is complied with by the laws in force to supply or disclose such information and explanation.

Where a member having obtained the professional certificate does not observe the conduct set forth in this Act as above, the concerned Employer may pursuant to section 35(1) of this Act, make a complaint to the Institute against such member (Dhan Singh, in this case).

Where it is found a fact to believe that a member having obtained the professional certificate has not observed the code of conduct required to be observed, the secretary shall submit a motion, accompanied by the available fact, to the Council of ICAN for taking action against such member pursuant to section 35(2) of this Act.

b) In pursuance to section 14(1) to 14(4) of this Act, there shall be a Disciplinary Committee as follows to inquire or investigate into a complaint and recommend the Council of ICAN for necessary action in cases where any one lodges a complaint in the Institute that any member has done any act or action contrary to this Act or the Rules or code of conduct framed under this Act, or where the Institute receives such information:

(a) A fellow chartered accountant designated by the Council of ICAN from amongst the Councilors referred to in Clause (a) of Sub-section (3) of Section 7 – Chairperson

(b) Three persons nominated by the Council of ICAN from amongst the councilors –Member

(c) Two persons nominated by the Council of ICAN from amongst the members –Member

(d) One person nominated by the Auditor General –Member

The procedures relating to the meeting of Disciplinary Committee and the term of office of the chairperson and members of the Disciplinary Committee shall be as prescribed in the Rules.

The Disciplinary Committee shall have the same powers as are vested in the court of law in respect of issuing an order to the concerned person, receiving evidence and examining witnesses.

c) Pursuant to section 14(5) of this Act, the Disciplinary Committee shall make recommendation, along with its opinion and finding, to the Council of ICAN for taking necessary action against Dhan Singh, if found guilty from its investigation; and the Council of ICAN may, in view of such recommendation, impose any of the following penalties against Dhan Singh, according to the gravity of the offence:

(a) Reprimanding;

(b) Removing from the membership for a period not exceeding Five years;

(c) Prohibiting from carrying on the accountancy for any specific period;
(d) Canceling the professional certificate or membership.

Before imposing a punishment as above, the Council of ICAN shall provide reasonable opportunity to Dhan Singh to submit his clarification in this regard.

d) Dhan Singh may, if he is not satisfied with the decision referred to in Sub-section (5) above to punish him, make an appeal to the Court of Appeal against such decision in pursuance to section 14(8) of the above Act.

Question No.: 20

Answer the following questions

a) Describe different punishment as per Nepal Chartered Accountants Act 2053 to Dharmendra, Jitendra and Bijendra for the following culpability:
   i) Dharmendra who without holding the Certificate of Practice proved to have signed a document in capacity of the member holding Certificate of Practice
   ii) Jitendra as being a member of ICAN, committed an act contrary to the provisions of this Act which was other than the provision of Section 41.
   iii) Bijendra who first time used the seal of the Institute in contravention to Section 6 of the Act.
b) Under what circumstances may the Council of ICAN issue order to remove the name of a member from the membership register, or order to invalidate the membership and Certificate of Practice of a member? Answer it in the light of Nepal Chartered Accountants Act, 2053.

(December, 2012)(2×5=10 Marks)

Answer:

a) Section 41 of Nepal Chartered Accountants Act, 2053 has made different level of punishment for different levels of culpability.

Punishment to Dharmendra

If 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. Dhamendra is to be punished accordingly.

Punishment to Jidendra

A member, who commits any act contrary to the provisions of this Act other than the provisions of Section 41, 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.

Punishment to Bijendra

If a person, who in contravention of Section 6 of Nepal Chartered Accountants Act, 2053 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. Hence, Bijendra might be punished for penalty of one thousand rupees maximum as this is the use of seal for the first time.

b) Pursuant to Section 22 of Nepal Chartered Accountants Act, 2053, the Council of ICAN may issue an order to remove the name of any member of ICAN from the membership register, in any of the following circumstances:

(i) If the member is convicted by a court of a criminal offence involving moral turpitude and punished for such offence;

(ii) If the member fails to pay the fees required to be paid to ICAN;

(iii) If the member fails to abide by the professional conduct referred to in this Act and the Rules framed under this Act;

(iv) If the member becomes insane; or

(v) If the member dies.

Pursuant to Section 23 of this Act, where an information is received that the name of any person has happened to be registered in the membership of ICAN by fraud or mistake and such matter is found to be true upon holding an inquiry into the matter, the Council of ICAN may cancel the membership registration certificate of such person, and also the Certificate of Practice, if any, granted to such person; and a notice thereof shall be publicly announced.

Question No.: 21

Answer the following questions

a) Briefly explain the rights and duties of the Accounting Standards Board and Auditing Standards Board as per Nepal Chartered Accountants Act, 2053.

b) ICAN received a registered letter containing a complaint against Mr. Dinne Rai, a member of ICAN that he conducts audit in partnership with a person who has not obtained a certificate of practice, which is a prohibited under the Act. How and what action the Council of ICAN can take against Mr. Dinne Rai for not upholding the code of conduct under Nepal Chartered Accountants Act, 2053?

(June, 2012)(2×5=10 Marks)

Answer:

a) As per section 15B the functions, duties and powers of the Accounting Standards Board shall be as follows:

(a) To provide for accounting standards, also based on international accounting standards, in order to systematize and regulate the accountancy and financial reports;

(b) To prepare appropriate modalities in order to develop accounting standards and publish materials relating to accounting standards;
(c) To amend, improve and revise accounting standards;
(d) To interpret accounting standards;
(e) To perform other acts relating to accounting standards.

As per section 15E the functions, duties and powers of the Standards on Auditing Board shall be as follows:

(a) To provide for standards on auditing, also based on international standards on auditing, in order to systematize and regulate the accountancy and financial reports;
(b) To prepare appropriate modalities in order to develop standards on auditing and publish materials relating to standards on auditing;
(c) To amend, improve and revise standards on auditing;
(d) To interpret standards on auditing;
(e) To perform other acts relating to standards on auditing.

b) Pursuant to section 35 of Nepal Chartered Accountants Act, 1997 where a member having obtained the professional certificate does not observe the conduct set forth in this Act or the Rules framed under this Act or such member violates this Act or the Rules framed under this Act, the concerned person may make a complaint to ICAN Council against such member Dinne Rai under this provision.

Where there is a reason to believe that the member Dinne Rai having obtained the professional certificate has not observed the conduct required to be observed, the Executive Director of ICAN, shall submit a motion, accompanied by the available fact, to the Council of ICAN for taking action against him.

The Council of ICAN thereupon refers this case to the Disciplinary Committee of ICAN for investigation under sections 11(k) and 14 of this Act. The Disciplinary Committee shall exercise its authority similar to a judicial court while investigating evidences and witnesses under section 14(4) of this Act.

The Disciplinary committee shall make recommendation, along with its opinion and finding, to the Council for taking necessary action against him if found guilty from its investigation, and the Council may, in view of such recommendation, impose any of the following penalties on Dinne Rai, according to the gravity of the offence committed under section 34(2) of this Act:

(a) Reprimanding;
(b) Removing from the membership for a period not exceeding Five years;
(c) Prohibiting from carrying on the accounting profession for any specific period;
(d) Canceling the professional certificate or membership.

Before imposing the penalty, the Council shall provide a reasonable opportunity to the concerned member to defend himself. Dinne Rai may, if he is not satisfied with the decision may appeal to the Court of Appeal pursuant to section 14(8) of this Act.

Question No.: 22

Define the formation of Standard on Auditing Board under ICAN Act, 2053. Also write its importance to enhance the accounting profession?

(Final/June, 2012)(5 Marks)

Answer:

Section 15d of Nepal Chartered Accountants Act 2053 prescribes about the formation of the Standard on Auditing Board. **Government of Nepal**, in order to govern and regulate accounting and auditing profession, shall constitute Standards on Auditing Board. Accordingly, the Board was constituted by the Government of Nepal on 26 Falgun 2059 corresponding to 10 March, 2003 under Nepal Chartered Accountants Act, 2053 (first amendment 2058). The Standards on Auditing Board shall comprise of following 7 members:

a) One FCA member nominated by Government of Nepal – Chairperson
b) Representative, Ministry of Finance – Member
c) Representative, Office of the Auditor General – Member
d) Three Chartered Accountants nominated by Government of Nepal on recommendation of the Council – Member
e) One Registered Auditor nominated by Government of Nepal on recommendation of the Council – Member

The Standards on Auditing Board (AuSB), if deems necessary, may invite concerned experts to participate in the meeting as observer.

The tenure of members as per clause (a), (d) and (e) shall be of three years and shall be eligible for re-appointment on expiry of their tenure. The business procedure of Standards on Auditing Board shall be as prescribed by the Standards on Auditing Board itself. The secretariat of Standards on Auditing Board shall be stationed in the Head Office of the Institute.

The board has full discretion in developing and pursuing the technical agenda for setting Auditing Standards.

The main function of AuSB is to review existing practices in Nepal and to develop Nepal Standards on Auditing (NSAs) so that these may be issued and regulated by the Council of the ICAN. While formulating NSA(s), the AuSB considers the applicable laws, customs, usages and business environments in Nepal. The NSAs are issued under the authority of the Chartered Accountants Act, 1997 (first amendment 2002). The AuSB issues Guidance notes on the issues arising from the NSAs wherever necessary. AuSB reviews and revises the NSAs at periodical intervals or as per the need of the respective standards. The AuSB determines the broad areas in which the NSAs need to be formulated and the priority in regard to the selection thereof.

Right and Duties of AuSB Board are prescribed under NCA Act under Section 15e as follows:

a) To develop Standards on Auditing ,on the basis of relevant International Standards on Auditing, in order to govern and regulate auditing and accounting profession.
b) To develop appropriate process of development of standards on auditing standards and publish materials related to accounting standards.
c) To redraft, improvise and revise standards on auditing.
d) To interpret the standards of Auditing.
e) To undertake other related tasks related to standards on auditing

Question No.: 23

Ms. Jenifer Fernandez, a foreign citizen has passed the CAP-III level examination conducted by the ICAN in December 2010 and now she intends to practice accountancy profession in Nepal. Will it be possible for her to practice accountancy profession in Nepal as per the Nepal Chartered Accountants Act and Rules?

(Final/December, 2011)(5 Marks)

Answer:

Nepal Chartered Accountants Rules, 2061 provides opportunities to foreign nationals qualified from ICAN to practice the accountancy profession as follows:

Rule 56: Person other than Nepali citizen can practice accountancy profession:

1) Notwithstanding anything contained anywhere in this Nepal Chartered accountant Rules, 2061, any foreign citizen eligible according to these rules can perform accountancy profession in the kingdom of Nepal only after registering a firm in partnership with a citizen of Nepal.
2) Nature, scope and limitations of the firm in partnership according to sub-rule (1) shall be as decided by the council.
3) Notwithstanding anything contained anywhere in this Nepal Chartered accountant Rules, 2061 a foreign citizen performing accountancy profession acquiring membership from the ICAN shall have to register a firm in partnership as stated in sub- rule (1) within 2 years of the date these rules came into effect.

Rule 58 (5) the share of a foreign citizen as a partner in an accounting firm must not exceed 51 %.

Question No.: 24

Duties and responsibilities of ICAN members

(Final/December, 2011)(5 Marks)

Answer:

Duties and responsibilities of ICAN member:

Pursuant to Rule 64 of ICAN Rules, 2061 every members performing accounting profession shall have to follow the following duties and responsibilities:

(a) Shall behave with the stance of impartiality and self-determination,
(b) Shall follow the code of conduct brought out by the council,
(c) Shall keep the records according to standards of Nepal auditing and Nepal accounts.

(d) A member holding Certificate of Practice according to section 31 of the Chartered Accountant Act shall explain the subject matter specified in existing laws in relation to the relevant matters as required in his audit report.
(e) Shall follow and execute the directions issued by the council from time to time.

Question No.: 25

X, one of the partners of XYZ & Company, Chartered Accountants Firm is being appointed as statutory auditor of Zink Limited, where Y's wife is working as Managing Director. Do the provisions of Nepal Chartered Accountants Act, 2053 and its' Code of Ethics be attracted in this case? If yes, explain with reference to the provisions of the Nepal Chartered Accountants Act, 2053 and its' regulations

(June, 2010)(5 Marks)

Answer:

Relationships should be avoided which allow prejudice, bias or influences of others to override objectivity.

There may be the risk of pressure from an overbearing supervisor, manager, director or partner; or when there is family or personal relationships that can give rise to the possibility of pressures being exerted upon them. Indeed, relationships or interests that could adversely influence, impair or threaten a professional accountant's integrity should be discouraged.

Personal and family relationships can affect independence. There is a particular need to ensure that an independent approach to any assignment is not endangered as a consequence of any personal or family relationship.

Family relationships which always pose an unacceptable threat to independence are those in which a sole practitioner or a partner in a practice, or an employee engaged on the assignment relating to the client, is the spouse, dependent child, the parent or grandparent, or relative living in a common household, of the client.

In the above case Mr. X should not accept his appointment.

Question No.: 26

How is the fund of the Institute of Chartered Accountants of Nepal created and operated and how the audit of accounts of the Institute of Chartered Accountants of Nepal is conducted? Answer in the light of Nepal Chartered Accountants Act, 2053.

[June, 2010](5 Marks)

Answer:

The Fund of ICAN is created under section 36 of Nepal Chartered Accountants Act, 2053 as under:

1) The ICAN shall have a separate fund of its own; and the fund shall consist of the following amounts:
   a) Grants received from Government of Nepal;

b) Amounts received from international or foreign organizations or institutions;
ICAN should obtain prior approval from the Government of Nepal in this case.
c) Amounts received while registering the names of members of ICAN or issuing the professional certificates;
d) Amounts earned from the movable and immovable properties of ICAN;
e) Amounts received by ICAN from other sources.

2) All amounts to be received by ICAN shall be credited to an account to be opened with any commercial bank within Nepal.
3) All expenditures to be incurred by ICAN shall be chargeable on the fund as referred to in sub-section (1) above of this section.
Specific Fund should be spent on the same purpose only.
4) The Executive Director shall make expenses chargeable on the fund subject to the control and supervision of the Council of ICAN.
5) The account of ICAN shall be operated as prescribed by its Council.

Pursuant to section 37 of this Act:

1) The accounts of the incomes and expenditures of ICAN shall be maintained in the format as prescribed by its Council.
2) The accounts of ICAN shall be audited by a designated member having obtained the professional certificate.
3) Government of Nepal may, if it so wishes, inspect, or cause to be inspected, any documents relating to the accounts of ICAN at any time.

Question No.: 27

Mr. Terence has registered as member under sub section (2) (b) of the Section 16 of the Nepal Chartered Accountants Act, 1997 after passing Chartered Accountants Membership Examination of the Institute of Chartered Accountants of Nepal in 2007 and got Certificate of Practice under Section 28 of the same Act. In the due course, it was found that certificate submitted by Mr. Terence was false on the ground that he has not passed any Chartered Accountant Examination in the Institute of Chartered Accountants of India. The certificate that was submitted to the Institute of Chartered Accountants in Nepal was fraudulent paper prepared by him somewhere else.

i) State the procedures of cancellation of the membership and certificate of practice of Mr. Terence.
ii) What types of penalties in addition to the above does Mr. Terence get?

(December, 2009)(10 Marks)

Answer:

i) As per section 23 of Nepal Chartered Accountants Act 2053, the council, upon receipt of information that a person has been registered in the Membership register by fraud or by mistake and upon an inquiry such matter has been found to be true, may order to invalidate such

membership and Certificate of Practice, if any. Notice of such actions shall be publicly announced.

ii) Section 41 sub-section (4) of the Act, attracts the case and the member who has committed such act which is contrary to the provisions of this Act or Regulations framed under this Act other than the provisions of this section. Hence he shall be suspended for a maximum period of five years and shall be liable of punishment with a maximum penalty of two thousands rupees or imprisonment for a maximum period of three months or both. In a given case, the Mr. Terence has not passed the Chartered Accountant Examination and his membership certificate will be seized forever.

Audit and related works conducted by the person who fraudulently obtained the CA membership along with Certificate of Practice will be invalid.

Question No.: 28

Can the member of one Standing Committee constituted by the Council of the Institute of Chartered Accountants of Nepal (ICAN) be a member of another Standing Committee of the Council? Would your answer be any different if the member in question is the Vice- President of the Council?

(June, 2008)(5 Marks)

Answer:

According to Section 13(4) of the Nepal Chartered Accountants Act 1997, the Standing Committee constituted by the Council shall not be so constituted that the members of one Committee, except the President and the Vice-President are also included in another Committee. Accordingly, member of one Standing Committee constituted by the Council of the ICAN cannot be a member of another Standing Committee.

Yes, the Vice-President can be a member in more than one Standing Committee of the ICAN.

Question No.: 29

What is the composition and role of Disciplinary Committee prescribed by Nepal Chartered Accountants Act, 1997? How will complaints lodged against members of Disciplinary Committee/ Council be handled?

(December, 2007)(5 Marks)

Answer:

As per section 14 of Nepal Chartered Accountants Act 2053, the composition of the Disciplinary Committee shall be as follows:

i) A FCA member designated by Council from among the Council members -Chairperson
ii) Three persons nominated by the Council from amongst the Council members -Member
iii) Two persons nominated by the Council from amongst the members -Member
iv)One person nominated by the Auditor General -Member

The role of the Disciplinary Committee is to recommend to the Council to take necessary actions, after investigation upon complains lodged against any member of the Institute for any action contrary to the Nepal Chartered Accountants Act 2053, its Regulation 2061 or the Code of Conduct.

If a complaint is lodged against the member or the Chairman of the Disciplinary Committee, then the member or the Chairman shall not be allowed to attend any meeting that hears complaints against the member or Chairman [Sec 14(2)].

Similarly, if a complaint is lodged against any Council Member and such case, after investigation, is recommended for action by the Disciplinary Committee to the Council, the concerned Council Member shall not be allowed to attend and vote at the Council meeting where the Council is hearing such recommendation [Sec 14(6)].

Question No.:30

Mr. Lurupuru is a practicing Fellow Chartered Accountant. Examine whether his following activities are in contravention of the Nepal Chartered Accountants Act, 1997?

i. He shares his profit with Mr. Mastaram, his cousin, who is a Chartered Accountant finalist and working in his firm. He is hopeful that Mastaram will qualify very soon and make his 50% partner in his firm.
ii. He discloses the information gathered in the course of professional service to one of his clients to the Inland Revenue Department.
iii. He fixed the audit fees as the percentage of turnover of his one client.
iv. He certified the financial statement of his client based on the fact that his employee has checked and verified it though he has not.
v. He took up an audit assignment of a company in which his senior employee worked as an employee till last year.

(June, 2007)(5 Marks)

Answer:

The activities of Mr. Lurupuru, FCA, should be observed and commented on the basis of Section 34 of the Nepal Chartered Accountants Act, 1997.

i) No, he cannot do so as per the Section 34 (3) of the Act.
ii) No, he cannot disclose the information to IRD voluntarily as per Section 34(5) unless permitted by the respective client or compelled by the law to do so
iii) No, he cannot do so as per Section 34 (10) of the Act.
iv) Yes, he can certify the statements as per Section 34 (6) of the Act.
v) Yes, he can as per Section 34(12).

Question No.: 31

Mr. Puru Prasad, a Chartered Accountant in practice entered into partnership with Mr. Lalu Prasad, an advocate for sharing of professional fees for work done by each other. However, due to some

disputes, the partnership was dissolved after 2 months without any fees having been received. Comment with reference to the Nepal Chartered Accountants Act, 1997 and code of ethics.

(December, 2006)(5 Marks)

Answer:

Section 34 of Nepal Chartered Accountants Act 1997 do not allow to share professional fees with non-members of the institute. Hence, a Chartered Accountant will be guilty of professional misconduct if he enters into partnership with any person other than members of ICAN. Therefore in the given case Mr. Puru Prasad, a Chartered Accountant in practice would be held guilty of professional misconduct irrespective of the fact that no work or fee was shared and the partnership was dissolve after one month.

Question No.: 32

Mr. Clever, a Chartered Accountant, who is the auditor of XYZ Limited a manufacturing industry and become aware of the secret production process of the company developed at a heavy cost. He describes the same in details to his wife, and aware that she will take advantage of this information to start a similar manufacturing industry on her own. Whether Mr. Clever, violates the code of conduct of the Nepal Chartered Accountants Act, 1997? Decide with reference to the Nepal Chartered Accountants Act, 1997.

(June, 2006)(5 Marks)

Answer:

According to section 34(5) of the Nepal Chartered Accountants Act 1997, one shall not disclose or divulge any information and explanations acquired in the course of his profession to any person other than the employer employing him and the person whom he is complied with by the law to do so. Therefore, confidentiality should always be observed by a professional accountant unless specific authority has been given to disclose information or there is a legal or professional duty to disclose. In the given situation, Mr. Clever has disclosed to his wife, the company's secret production process to start a similar manufacturing industry on her own, which has come to his knowledge in his capacity as the auditor of the company and therefore, he should be deemed to be guilty of professional misconduct due to breach of the code of conduct.

Question No.: 33

Mr. Fantoos, a practicing Chartered Accountant gave an advertisement under column "Business & Professional" of a local newspaper offering various types of Financial and other consultancy services. Decide whether Mr. Fantoos, violates the code of conduct as per the provisions contained in Nepal Chartered Accountants Act, 1997.

(June, 2006)(5 Marks)

Answer:

Section 34 of Nepal Chartered Accountants Act, 1997, provides that a member in practice shall not solicits and advertises the professional work either directly or indirectly through advertisement

and by any other means, which are not allowed to do so. This section restricts a member not to solicit professional work by means of advertisement and by any other means. An advertisement for a various type of financial and other consultancy services under the column "Business and Professional" in a local newspaper by practicing Chartered Accountant would not be permissible because it would essentially be an offer for professional services. Therefore Mr. Fantoos, would be guilty of professional misconduct, which he violates the provisions of code of conduct.

Question No.: 34

Mr. Pappu Yadav accounting professional convicted by a court in a criminal offence involving moral turpitude and punished thereof. The council removed his name from the Membership Register. After completion of punishment, he wishes to restore his membership. Can he do so?

(December, 2005)(5 Marks)

Answer:

Yes, Mr. Pappu Yadav accounting professional can re-instate his name again, according to section 22 (2) of Nepal Chartered Accountants Act, 1997, which reads that, in case a person whose name has been removed from the membership because, convicted by a court in a criminal offence involving moral turpitude and punish thereof, can give application along with reasonable ground to obtain the membership again, the council may decide following the rule 48 of Nepal Chartered Accountants Regulation, 2061. The removed member has to justify by his statements including annual fee with an addition of 40% for each default year. If the council deems such statement reasonable to consider and decides to reinstate the membership as per section 22 (2) of the Act, the name of Mr. Pappu Yadav shall be reentered in the membership register.

Question No.: 35

Write a short note on Board of Auditing Standards

(December, 2004)(5 Marks)

Answer:

(2) Government of Nepal in order to govern & regulate accounting & auditing profession shall constitute a Board an Auditing Standards. The Composition of the Board is as follows:

i. One FCA member nominated by Government of Nepal — Chairman
ii. Representative from Ministry of Finance — Member
iii. Representative from the Office of Auditor General — Member
iv. Three CAs nominated by the Govt. on the recommendation of the Council — Member
v. One Registered Auditor nominated by the Govt. on the recommendation of the Council. — Member

(3) The tenure of members shall be of three years & shall be re-eligible.

(4) The business procedures shall be as prescribed by the Board itself.
(5) The secretarial of the Board shall be stationed in the office of the Institute.
(6) Rights and Duties of the Boards:
   i. To develop standards on Auditing in keeping with international standards on Auditing in order to regulate accounting & auditing profession
   ii. To evolve appropriate processes of development of Standards on Auditing.
   iii. To redraft, improve & revise Standards on Auditing

Question No.: 36

Mr. Kaluram, a RA member elected to the council of the ICAN on August 15, 2002, was convicted by CIAA and his resignation, submitted on moral grounds, is accepted by the council w.e.f. No. 15, 2003. Examine the following

i. How will the vacancy caused by the resignation of Mr. Kaluram be filled?
ii. Would the procedure be different if Mr. Kaluram's resignation was effective from Nov. 15, 2004?
iii. How would the vacancy be filled up if Mr. Kaluram was nominated in the council by HMG[1]?

(December, 2003)(2+2+1 = 5 Marks)(December, 2005)(5 Marks)

Answer:

According to Section 9 (1) of the Nepal Chartered Accountants Act, 1997, the council shall designate any member as council member, if a seat of any member elected pursuant to clause (a) and (b) of section 7 (3) falls vacant, for the remaining term of office, provided the remaining term of office is less than one year. But such vacancy shall be filled up through election if the remaining term is more than one year.

i. The vacancy caused by the resignation of Mr. Kaluram will be filled through a bye-election in which another RA member would be elected among RAs.
ii. If Mr. Kaluram's resignation was effective from Nov. 15, 2004, the remaining term of office would be less than one year. Hence, the council would fill the vacancy by designating another eligible RA member of the Institute as a council member.
iii. As per Section 9 (2) of the Act, vacancy caused owing to death or resignation of any council member, nominated pursuant to clause (c) of Section 7 (3), shall be filled up, for the remaining term of office, through nomination by GoN on the recommendation of the Auditor General.

Question No.: 37

Mr. Tirtha Narayan Rajbhandari (TNR), a FCA member of the ICAN retired from the services of Jumbo Pvt. Ltd. on Asar 31, 2059. Subsequent to his retirement, he was engaged by the company

as a consultant to prepare a Project feasibility report to be submitted to the bank to avail a term loan of Rs. 500 Millions. The fee agreed to was 1% of the loan sanctioned by the bank and appointment of Mr. TNR as the statutory auditor of the Company for the FY 2060/61 if the bank approved the total loan applied for (i.e. Rs. 500 millions).
Comment on the terms of this agreement in the light of Nepal Chartered Accountants Act, 1997. Can the council take any action suo motto against Mr. TNR?

(December, 2003)(5 Marks)

Answer:

According to Section 34 (1) of the Nepal Chartered Accountants Act, 1997, members of the institute holding certificate of practice, shall not base their remuneration as a percentage of profit or contingent on any other uncertain results.
Sub-section 12 of Section 34 of the Act states that one shall not perform audit of accounts of any organization where he has served till the elapse of at least 3 years of his leaving the service.
Hence, both the of agreement i.e. fees as a percentage of loan sanction and appointment of Mr. TNR as statutory auditor for the financial year 2060/61 violate the code of conduct that a member of the institute is required to observe. Section 35 of the Act requires the aggrieved party to lodge a complaint against any member for not upholding the conduct.

CHAPTER-2

COMPANIES ACT, 2063 AND RULES

[Note: All answers suggested hereby have been updated as per Companies Act, 2063 with First Amendment, 2074 and To Make Favorable with the Constitution of Nepal Some Nepal Amending Acts, 2075]

Question No. 1 :

The paid-up capital of JHI Private Limited is Rs. 10 Crores in the form of 7,00,000 Equity Shares of Rs. 100 each and 3,00,000 Preference Shares of Rs 100 each. Morning Star Private Limited is holding 3,00,000 Equity Shares and 3,00,000 Preferences Shares in JHI Private Limited. State with reason, whether JHI Private Limited is subsidiary of Morning Private Limited? **(December 2022) (8 Marks)**

Answer:

According to Section 2(e) of Companies Act, 2063 "Subsidiary Company" means any company controlled by a holding company. Under section 142 (1) states that, a holding company may control its subsidiary company as follows:

i) By holding direct or indirect control over the formation of the board of directors;
ii) By holding majority shares of the company.

Section 142 (2) says, if any company becomes a subsidiary company of any other subsidiary company, the former company shall also be a subsidiary company of the holding company controlling the later company.

Under section 142 (3) the shares of a company are subscribed by any agent on behalf of the holding company or its subsidiary company or that the right to appoint directors of such company is exercised by any person nominated on behalf of the holding company or its subsidiary company, the conditions mentioned in Sub-section (1) shall be deemed to have been fulfilled. However, that while determining a holding company and a subsidiary company, the shares possessed in the following circumstances shall not be recognized for this purpose:

i) In cases where any company is entitled to exercise any power on the basis of holding debentures or a trust deed on the issue of debentures or having subscribed shares;
ii) In cases where a company lending credit has accepted the shares by way of security.

It is to be noted that Preference share capital will also be considered if preference shareholders have same voting rights as equity shareholders.

In the instant case, JHI Pvt. Ltd. is having paid-up capital of Rs. 10 Crores in the form of 7,00,000 Equity Shares of Rs. 100 each and 3,00,000 Preference Shares of Rs. 100 each. Morning Star Pvt. Ltd. is holding 3,00,000 Equity Shares and 3,00,000 Preference Shares in JHI Private Limited.

As in the given problem it is not clear that whether Preference Shares are having voting rights or not, it can be taken that there is no voting right with these shares. On the basis of provisions of Section 2(e) with section 65 (e) and facts of the given problem, Morning Star Pvt. Ltd. is holding 3,00,000 Equity Shares of total equity paid up share capital of JHI Pvt. Ltd. Therefore, as Morning Star Pvt. Ltd. does not exercise or controls unless by holding direct or indirect control over the formation of the board of directors' u/s 142 (1) (a) or by holding

majority shares u/s 142 (1) (b) in JHI Pvt. Ltd., So, JHI Pvt. Ltd. is not subsidiary of Morning Star Pvt. Ltd.

Question No. 2 :

All companies either private or public or company of non-distributing profit including foreign company are registered under the Company Act, 2063 in the Office of the Company Registrar and the relation of all types of companies shall be as good as it should be with the Office. Hence, the Office has retained certain power to control and monitor these companies and the Act has vested the power to do so. Generally, these companies shall have to submit information and reports to the Office as per the Act. What are the documents and information that have to be submitted or informed to the Office as per the companies Act, 2063? List out them along with the concerned section of the Act and the time period to be submitted to the office. **(December 2022) (10 Marks)**

Answer:

All companies registered under Companies Act, 2063 have to submit the documents and reports to Office as follows:

S.No.	Details of Information	Time Period for providing information
1	Amendment in Articles or Memorandum Section, 21 (2)	Within 30 days
2	Details of Share Distribution. Section, 31	Within 30 days from the date of distribution of shares
3	Records or shareholders, debenture holders and debt. Section 51(3)	Prepared 30 days before the annual general meeting and within 30 days of the meeting
4	Report of Public Limited Company Section,78	21 days before the annual general meeting
5	Annual details, Section, 80	• Every company within 30 days. • Every company should submit certified details within 6 months from the date of completion of FY

6	Director's declaration. Section, 92(3)	within 7 days of receipt in the company through the company in the office
7	Record book of director and company secretary. Section,107(2)	Within 15 days
8	Appointment of auditor. Section, 111(1)	Within 15 days
9	Answer to Complaint. Section, (120)	Within the specified time frame by the office
10	Death of a single shareholder. Section, 153 (2)	Within 1 month
11	Merge of company. Section, 177	Within 30 days
12	Details of Office Address, Section, 184	Within 3 months after the incorporation of company

Foreign Company

Details required to be submitted to the office by a foreign company as per Section 81 of the Companies Act 2063

S.No.	**Details of Information**	**Time Period for providing information**
1	Accounts, Audit Report and Annual Financial Statement Section, 156(1)	Within 6 months of completion of the Fiscal Year
2	Annual financial statements are prepared in accordance with the law of its home country, Audit Report and Director's Report. Section,156(2)	Within 3 months
3	Certified statement from the LP of the liaison office. Section, 156(5)	Within 3 months of completion of the Fiscal Year
4	Amendment or alternation to any documents submitted. Section,155(2)	Within 35 days

Question No. 3 :

Mrs. Kranti Singh, the chairman of the Nakul Dairy limited, issued bonus share after revaluating the assets of the Company. This company has also bought back its shares last year 2021. These two issues raised in the annual general meeting regarding its validity. So, the chairman consults you on this matter. He intends to know about the meaning of bonus share, its advantage, other condition for issuing bonus share. Provide the consultation to him referring the provision of the Companies Act, 2063. **(June 2022) (5 Marks)**

Answer:

Bonus Share Defined:

Section 2(q) of the Companies Act, 2063 has defined the term "Bonus share" as a share issued as an additional share to shareholders, by capitalizing the saving earned from the profits or the reserve fund of a company, and this term includes the increase of the paid up value of a share by capitalizing the saving or reserve fund.

A company may, if its Articles provide, capitalize its profits by issuing fully-paid bonus shares. The issue of bonus shares by a company is a common feature. When a company is prosperous and accumulates large distributable profits, it converts these accumulated profits into capital and divides the capital among the existing members in proportion to their entitlements. Members do not have to pay any amount for such shares. They are given free. The bonus shares allotted to the members do not represent taxable income in their hands. Issues of bonus shares is a bare machinery for capitalizing unsubscribed profits. The vesting of the rights in the bonus shares takes place when the shares are actually allotted and not from any earlier date.

Advantage of issuing Bonus Shares:

- Fund flow is not affected adversely.
- Market value of the Company's shares comes down to their nominal value by issue of bonus shares.
- Market value of the member's shareholdings increases with the increase in number of shares in the company.
- Bonus shares is not an income. Hence it is not a taxable income.
- Paid-up share capital increases with the issue of bonus shares.

Conditions of the issuing Bonus Share provided in the Companies Act:

- The company may use the moneys in the account that is managed with premium account as referred to in Sub-section (2) of section 29 of the Companies Act for

paying up unissued share capital to be issued to the shareholders as fully paid bonus shares as per the Section 29(3)(a).

- Any company may issue bonus shares that they may be subscribed by its existing shareholders and employees only or issuing shares pursuant to Sub-section (9) of section 56 of the Companies Act, such company shall not be required to fulfill procedures as provided in this act and existing law of securities.
- No share capital shall be increased or bonus share issued by revaluating the assets of a company other than from profits made by the company or funds created out of profits as per the Section 56(10) of Companies Act.
- Once a company buys back any class of shares pursuant to this Section, the company shall not re-issue the shares of that class, except for the issue of bonus shares or payment of its liability, prior to the expiration of two years after such buy-back as per the Section 61(8) of this Act.
- A company may issue new shares to its shareholders as fully paid bonus shares, out of the capital redemption reserve funds.
- Special resolutions shall be presented in the general meeting of a company for decision on the issuing bonus share. Section 83(e)
- Bonus share shall be issued: Section 179

(1) A company may, by adopting a special resolution in the general meeting, issue bonus shares to its shareholders, out of the amount available for the distribution as dividend.

(2) Where a company is to issue bonus shares pursuant to Subsection (1), the company shall give information thereof to the Office before issuing such shares.

Validity of the issues:

In accordance with the legal provisions mentioned above, the issue of bonus shares with revaluating the assets of the Company is prohibited and thus it is not valid. The terms of buy back shares as mentioned in the section 61(8) couldn't affect to issue of bonus share. However, in this instant case, the issue of bonus share is not valid and it is meaningless for the buyback provisions.

Question No. 4 :

Mrs. A had made a contract prior to the incorporation of the X Tiles Limited. After its incorporation she held shares of the nominal value of Rs. 20000.00 having paid Rs. 10000.00. She is a director of the company till now. Company has just declared to be insolvent. In the light of the situation, answer the following questions with reference to the legal provision of the companies Act, 2063.

i) What is the validity of the pre-incorporation of the contract?
ii) What is the liability of Mrs. A's as a director for matters contained in the prospectus of the company?

iii) What is the liability of the Mrs. A's in reference to the principle of limited liability? **(June 2022) (3+4+3)**

Answer:

(i) Validity of the Pre-incorporation contract:

It is provided in section 17 of the Companies Act, 2063. Pursuant to the said section, a contract made prior to the incorporation of a company is called pre-incorporation contract. It shall be a proposed contract only, and such contract shall not be binding on the company. If, prior to the incorporation of a company, any person carries on any transaction or borrows money on behalf of the company, such person shall be personally liable for any contract related with the transaction so carried on. If, within the time mentioned in any transaction or within the reasonable time after the incorporation of a company, the company, through its act, action or conduct, accepts any act, action or conduct, accepts any act, action to borrowing done or made prior to the date of authorization to commence its transactions or endorses such act or action, that transaction shall be binding on the company and the other contracting party; and the person carrying out such act to action shall be released from the personal liability to be borne. The consensus agreement of a private company shall govern any contract made prior to the incorporation of such company.

In this instant case, it is not clear whether or not that the company has been endorsed pursuant to the section 17. However, the contractual terms whether it should be endorsing or not depends on the company's decision. If the company would not accept or endorse the contractual liability, then she is liable alone for the expenses or liability of the contract. In UK, the Companies Act, 2006, Section 51, has not endorsed the liability of the company and person who has incurred any amount for the company, himself/herself has been liable for pre-incorporation contract.

(ii) Liability of the Mrs. A's as a director on matters contained in the prospectus:

Section 24 of the Companies Act, 2063 has provided the clear provision on the liability on matters contained in the prospectus published. Pursuant to this section, it shall be the duty and obligation of the concerned company to abide by the matters contained in the prospectus published under Section 23 of the Act. The directors who have signed the prospectus as referred to in Sub-section (1) shall be liable for the matters mentioned in that prospectus. If any published prospectus contains false statements made maliciously or deliberately and any person sustains any loss or damage by reason of his/her subscription of securities on the faith of that prospectus, the directors who have signed that prospectus shall be personally liable to pay compensation for the actual loss or damage so sustained. A promoter who resigns before the decision made by the company to publish the prospectus or whom on becoming aware of any false statement in the prospectus, publishes a notice of that matter to the information of the general public prior to the sale or allotment of securities or who proves that he/she did not

know that the prospectus contained any false statement shall not be liable to bear such compensation.

It is clear that the above legal provision makes the director liable who has affixed his/her signature on the prospectus. Therefore, Mrs. X is responsible if she is a signatory of the prospectus. Otherwise, she is not responsible being mere a director.

Limited liability:

The principle of limited liability is one of the principal advantages of doing business under the corporate form of organization. The company is taken as an owner of its assets. So, the company is bound by its liabilities. The liability of a member as a shareholder extends to its contribution to the assets of the company up to the nominal value of the shares held and not paid by him/her.

Section 8 of the Companies Act, 2063 has accepted the principle and provided as the liability of a shareholder of a company incorporated under this Act in respect of its transactions shall be limited on to the maximum value of shares which he has subscribed or undertaken to subscribe.

Members, even as whole, are neither the owners of the company's undertakings, nor liable for its debts. In other words, a shareholder is liable to pay the balance, if any, due on the shares held by him, when called upon to pay and nothing more, even if the liabilities of the company far exceed its assets. This means that the liability of a member is limited up to the value and number of the shares he/she promise. If any transaction is carried on with intent to defraud creditors, the court may declare the persons who were knowingly parties to the transaction as personally liable without limitation of liability for all or any of the debts/liabilities of the company.

In the instant case, Mrs. X has promised to pay Rs. 20,000.00. She has paid only half of the amount Rs.10000.00. Now, she has to pay the remaining call amount Rs. 10,000.00. The principle of limited liability refers to Mrs. X, that she has to pay or is liable for remaining call amount. However, if any shareholder, has carried on any transactions with intent to defraud creditors then he/she should pay the questioned transaction amount. In this case, the defraud question is not in requirement so she is not responsible. But if the question is raised then she should be responsible in accordance with law requires.

Question No. 5 :

Normally a company is to be managed by the Board of Directors (BOD). They are the key persons and drive the whole business of the company. The progress and prosperity of the company's business totally rely on the faith and sincerity of Board of Directors. In the light of this statement, answer the following questions with reference to the legal provisions of the Companies Act, 2063.How the BOD is appointed?

i) State the eligibility to be appointed as a BOD.

ii) In what conditions the directors can be removed from their post?

(December, 2021) (4+4+2=10 marks)

Answer:

The provision regarding Board of Directors (BOD) has been prescribed in Chapter 6 of the Companies Act, 2063. Section 86 of this Act Provides for the Board of Directors and the number of its Directors.

i) Process of appointment of directors:

Section 87 of the Companies Act prescribes the provision regarding the appointment of directors. According to it, the directors of a company will be appointed by the general meeting of the company.

However, the first directors will be appointed by the promoters themselves, before holding the first annual general meeting of the company. Pursuant to Sec. 90(2) provision (2) of this Act a director so appointed holds office only until the next annual general meeting.

If the post of any director appointed by the general meeting is vacated for any reason, the board of directors has power to appoint another new director in that vacancy. Any director appointed in a vacated office before the expiry of his term, holds the office only until the remainder of the term of office of that director in whose place he is appointed, pursuant to section 90 (2) proviso (3) of this Act.

In case of a company, any shares of which has been subscribed by a corporate body may appoint a director in proportionate of the total number of directors of the company as per the number of shares subscribed by such body. Such corporate body also may appoint an alternative director to attend and vote in a meeting of the board instead of every such directors, in case where such directors will not be in a position to attend the meeting of the board for any reason. The alternative director will be entitled to attend, and vote in the meeting of the board of directors, where the director appointed by the corporate body is not able to attend a meeting of the board of directors, and gave information thereof to his alternative director and board of directors.

According to the Sec. 86(1) of the Companies Act, 2063, the appointment and number of directors of a private company will be as prescribed in its AOA. However, numbers should not exceed eleven.

The board of directors of a public company should have minimum of three and a maximum of eleven directors. Where, there are woman shareholders in a public company, there must be at least one director from woman shareholders pursuant to section 86(2) of this Act.

While forming the board of directors of a public company, it must appoint at least one independent director, in the case of the number of directors not exceeding seven, and least two independent directors, in the case of the number of directors exceeding seven, from amongst

the persons who have the knowledge as prescribed in the AOA of the company. The independent director will be appointed amongst the persons who have gained knowledge and experience in the subject related with the business of the company concerned pursuant to section 86(3) of this Act.

Any one director selected by the directors from amongst themselves will be the chairperson of the board of directors pursuant to section 86(4) of this Act.

Section 106 of this Act prescribes the validity of the acts already done by a director. According to Sec. 106, if there is procedural defect in appointment of any director, acts already done by such director before the discovery of such default will not render invalid by that reason. In such case there must have been a purported appointment.

ii) Qualification of directors*:* There are certain situations in which a person will not be entitled to be a director of a company. Certain persons because of their own conduct or characteristics may not be entitled to act as directors. Such disqualification may be because of:

i. Disqualification by age
ii. Disqualification because not a member as per AOA
iii. Other grounds for disqualification may be provided in the AOA, like bankrupt, insane, continuously absent in the board meeting for 6 months
iv. Statutory disqualification as prescribed in the Companies Act.

Section 89(1) of the Companies Act, 2063 prescribes following thirteen grounds of disqualifications of a person to be a directors: (a. to m.).

a. Who is below 21 years of age in case of a public company;
b. Who is of unsound mind or insane;
c. Who is declared insolvent and a period of five years has not lapsed;
d. Who is convicted of an offense of corruption or of an offence involving moral turpitude, provided that in the case of a private company, a period of three years has not lapsed from the date of such sentence,
e. Who is convicted of an offence of theft, fraud forgery etc. and period of three years has not elapsed from the expiry of the sentence;
f. Who has personal interest in the company business, or contract or transaction;
g. Who is already a director, substantial shareholder, employee, auditor or advisor of another company or having any personal interest in that company. But there is not such bar in the case of Private companies to appoint such a directors.

h. Who is a shareholder that is held to have failed to pay any amount due and payable by him to the concerned company;

i. Who has been sentenced to punishment pursuant to Section 160 a period of one year has not lapsed from the date of sentence or in the case of a person who has been sentenced to punishment pursuant to Section 161, a period of six months has not lapsed after the date of sentence

j. Who does not possess any qualification as prescribed thereof or suffers from any disqualifications in the case of a company carrying specific business;

k. Who is already a director of any company which has not submitted such returns and reports as required to be submitted to the Office, for any continuous three financial years;

l. Who has not paid an amount of fine due from his pursuant to Section 81(2) of this Act.

m. Who is holding the office of director receiving from another listed company remuneration or any facility except to actual meeting travel and daily allowances.

Accordingly Sec. 89(2) of this Act prescribes the grounds in which a person shall not be eligible to be appointed to the office of independent director as follows:

a. Who is a person as referred to in section 89(1) above.

b. Who is shareholder of the concerned company

c. Who has not acquired at least bachelor degree in a subject related to the business of the company and gained at least ten years of experience in the related field or in the company management

d. Who is officer, auditor or employee of the concerned company or three years has not lapsed after his retirement from any such office

e. Who is a close relative of the officer of the concerned company

f. Who is an auditor of the concerned company or his partner.

iii) Removal of the Director: Pursuant to Sect 89(3) of this Act, no person shall continue to hold the office of the director in any of the following circumstances***:***

a. If he suffers from any disqualification for the appointment to the post of director as prescribed above;

b. If the general meeting passes a resolution to remove him from the office of director;

c. If the resignation tendered by the director is accepted by the BOD;

d. If he is held by a court to have done any act involving dishonesty or ulterior motive in the activities of the company;

e. If he is held by a court to have done any act prohibited by the Act from being done or failed to do any act required to be done under the Act;

f. If he is blacklisted by a competent body as per the prevailing law, like default in repaying loan of any bank or financial institution, and period of such black listing has not expired.

However, prior to holding any person to be disqualified after being appointed director or holding such office, the company should provide him with reasonable opportunity to defend himself pursuant to section 89(4) of this Act.

Question No.6 :

A company may generally reduce its share capital in any way in accordance with the prevailing company law. Nepal Re-insurance Company Ltd. hired you as a consultant of the company to provide your advice. Give your advice on the following matters referring the relevant provisions of the Companies Act, 2063.

i) How is the share capital reduced?
ii) Can it be carried out without sanction of the court?
iii) What is the liability of the shareholders of the company?

(June, 2021) (10 Marks)

Answer:

i) Reduction of share capital means reduction of issued, subscribed and paid-up capital of the company. In particular, a company may do so by cancelling or reducing the liability on partly paid shares, repaying any paid-up share capital in excess of the company's wants, or cancelling any paid-up share capital that is lost or unrepresented by available assets.

The reduction of share capital is governed by the Section 57 of the Companies Act, 2063. It can be carried out by adopting special resolution at its general meeting by obtaining approval of the Court. Thereafter, it requires necessary amendment to or alteration in the memorandum of association and articles of association. On receipt of approval of the Court pursuant the company may reduce its share capital as follows:

(a) By reducing the capital to such amount as has been paid up where calls for payment of amount on shares are not fully paid up. Where the shares are of Rs. 100 each with Rs. 75 paid-up reduce them to Rs. 75 fully paid-up shares and thus relieve the shareholders from liability on the uncalled capital of Rs. 25 per share.

(b) By paying back any paid-up share capital,

(c) By devaluating the face value of shares where the company has sustained a big loss or suffered a natural calamity.

(d) A company which has already become insolvent in accordance with the prevailing law shall not reduce its capital pursuant to this Section.

ii) Reduction of share capital without sanction of Court:

The following are cases which amount to reduction of share capital and where no confirmation by the Court is necessary.

1. Surrender of shares:

   It means the surrender to the company on the part of the registered holder of shares already issued. Where shares are surrendered to the company, whether by way of settlement of a dispute or for any other reason, it will have the same effect as a transfer in favour of the company and amount to a reduction of share capital. But if, under any arrangement, such shares, instead of being surrendered to the company, are transferred to a nominee of the company then there will be no reduction of capital. Surrender may be accepted by the company under the same circumstances where forfeiture is justified. It has the effect of releasing the shareholder whose surrender is accepted from further liability on shares. The Companies Act, 2063 has not provided the measures of surrender of share; however, the article of association may provide it and do so.

2. Forfeiture of shares:

   A company, if authorized by its articles, may forfeit shares for non-repayment of calls and the same will not require confirmation of the Court. It may be carried out where the articles of the company may give power to it. Forfeiture will be effected by means of Board resolution. This power is exercised bona fide and in the interests of the company. It is carried out under section 53 if the Companies Act, 2063. Forfeiture is carried out to those shares where share holder couldn't pay amount of share in time prescribed by the company.

3. Diminution of capital:

   It is the cancellation of the unsubscribed part of the issued capital. It can be effected to do so. It does not need any confirmation of the Court.

4. Redemption of redeemable preference shares.
5. By back of its own shares under section 61.

iii) Liability of shareholders in respect of reduced share capital:

As per Section 59 of the Companies Act:

1. A shareholder of the company, past or present, shall not be liable, in respect of any share mentioned in the order issue by the Court confirming the reduction of share capital, to pay any amount exceeding the difference between the amount actually paid on the share or the reduced amount, if any, which is deemed to have been paid thereon, as the case may be, and the fixed amount of such share.

Provided, however, that where the list of creditors entitled to object to the reduction of share capital submitted to the Court omits any such creditor and, after an order confirming the reduction of capital of the company has been made, the company is unable to pay the amount of debt of such creditor, the shareholder of the company shall be bound to pay the amount as mentioned in Sub-section (3) or (4).

2. Notwithstanding anything contained in the proviso to Subsection (1), where the list submitted to the Court omits the name or any claim of a creditor because of a fault or negligence of his own, the shareholders shall not be bound to pay such amount.
3. A person who was a shareholder of a company at the date of issue by the Court of an order confirming the resolution for reducing the capital of the company shall be liable to pay an amount not exceeding the amount which he would have been liable to pay if the 63 company had undergone insolvency and commenced insolvency proceedings on the day immediately before the said date.
4. If a company is insolvent, and where an application is made by a creditor whose name is said to be omitted from the list of creditors submitted to the Court, along with the proof of omission of his name, the Court may, if it thinks fit, settle a list of shareholders who are liable to pay to the company the amount required for the repayment of loan of such creditor and issue an order to make calls on shares held by the shareholders settled on such list as if they were ordinary contributors in an insolvency process of the company.
5. Notwithstanding anything contained elsewhere in this Section, no shareholder shall be liable to pay an amount in excess of the face value of a share at the time of the subscription of such share by him.

Question No. 7:

Mr. A is one of the shareholders of a company XYZ. He wants to sell and pledge his shares and debentures. He doesn't know the process and legal provision regarding selling, pledging and transmitting the title of shares and debentures and hence, consulted you on this matter. Advise him on the following issues as per Companies Act, 2063:

i) How shares or debentures of a company can be sold or pledged on the basis of Companies Act, 2063?
ii) How are the title of shares or debentures transferred to new buyer?

(Dec, 2020) (5+5=10 marks)

Answer:

i) Following are the provisions regarding selling or pledging of shares or debentures as mentioned in section 42 of Companies Act, 2063:

   a) The share or debenture of a company may be sold or pledged as good as movable property, subject to this Act, the memorandum of association and articles of association.

b) Notwithstanding anything contained in Sub-section (1), the promoter of a company, other than a private company which has not borrowed loan from any other company, shall not be entitled to sell or pledge any share held by him/her until the first general meeting of that company is held and a call on the share issued in his/her name is fully paid up.

c) Where a share or debenture is pledged pursuant to Sub-section(a), the pledge shall make an application, in such format and along with such fees as may be prescribed, to the registered office of the company to have the matter recorded in the register. The applicant shall also submit the deed on pledge as well as the share or debenture certificate, along with the application to be so made.

d) Where an application is made pursuant to Sub-section (c), the company shall record in the register the execution of such pledge and on receipt of information on the redemption of the share or debenture so pledged, the records of such pledge shall be crossed off the register.

ii) Transferring of title of shares or debentures to new buyer is mentioned in section 43 of the Companies Act which is as follows:

a) If any share or debenture is sold, subject to Sub-sections(a) and (b) of Section 42, the buyer thereof shall make an application to the registered office of the company , in such format and along with such fees as may be prescribed, to have such debenture or share transmitted to his/her name. The applicant shall also submit, along with such application, a copy of the deed relating to the sale and purchase of share or debenture certificate.

b) If an application is made under Sub-section (a), the company shall cross off the name of transferor shareholder or debenture holder and enter the name of the transferee shareholder in the register within fifteen days after the making of such application.

c) Notwithstanding anything contained in Sub-section (a), if the prevailing law on securities transactions provides that no deed of transfer is required to transfer the title to the share or debenture of a company such deed shall not be required to be produced along with an application to be so made.

d) If a person who transfers any securities makes an application, also accompanied by a deed of transfer of share, signed by the purchaser to get the transfer of any share or debenture recorded, the company shall register the name of share or debenture transferee in the shareholder register or debenture holder register as if such application was made by the transferee him/herself.

e) If any person acquires the title to any share or debenture by operation of any other provision contained in the prevailing law the provision contained in Sub-section (a), shall not be deemed to prevent the company from registering such person as a shareholder or debenture-holder

Question No. 8:

Certain numbers of students, who have passed MBA are interested to carry out a specific business. For this they are planning to incorporate a company but they are not aware of the process of incorporation of a company. If they approach in this respect, how will you advise them with the legal provisions of the registration of the company as per the Companies Act, 2063 for the below question.

i) Who can register the company and state the required conditions to register a private and public company?
ii) State the process to be adopted for the registration of a company?
iii) State the conditions when the Company Registrar can refuse to register the company?

(Dec, 2020) (3+3+4=10 marks)

Answer:

i) Any person desirous of undertaking any enterprise with profit motive may, either singly or jointly with others, incorporate a company for the attainment of one or more objectives set forth in the memorandum of association as per Section 3 of the Company act 2063. The required conditions for the registration of a private or public company can be listed as follows:

   a. Minimum number or maximum number of shareholders

      According to Section 9 of the Companies Act, 2063 the number of shareholders of a private company should not exceed one hundred one and in case of public company the member of shareholders of a public company should be at least seven and maximum may be unlimited. However any employee who has purchased a share of a company under scheme of selling shares to employees will not be counted as a shareholder

   b. Minimum paid-up capital

      According to Section 11 of the Companies Act, 2063 the paid-up capital of a public company should be of ten million rupees except as otherwise provided in the prevailing law and in case of private company there is no such restriction.

   c. The word Pvt. Ltd and Ltd at the end of the name

      A private company should add the words “private limited’’ to its name as the last words and a public company should add the word “limited” to its name as the last word pursuant to section 10 (Kha) of this Act. Pursuant to section 10 (Ka) of this Act the company shall carry on all of its activities and transactions by this name.

   d. Some specific business as public company only

      Section 12 states that to be incorporated as public company, it needs to carry on some specific transactions. Any company carrying on the business of banking, financial transactions, insurance business related transactions, stock exchange business, pension fund or mutual fund or a company carrying on such other business or transactions as may

be prescribed should be incorporated as a public company. A private company is not allowed to carry such substantial public concern business.

ii) It is mandatory to register a company to carry out business transaction under a name of a company. Incorporation of a company means establishment or registration of the company or a corporate body as a legal person or legal entity. According to Sec. 5(5) of the Companies Act, 2063 a person cannot use the name of company to carry any kind of transaction by the name of any institution or firm. Thus, registration of a company is compulsory to carry any business under its name.

The process regarding registration of a company has been prescribed in Sec. 3, 4 and 5 of the Companies Act. The first amendment made in 2074.1.19 allows incorporation of a company via electronic transmission with digital recording.

Prior to registration, it is necessary to submit an application as per Section 4 of the Act. Any person desirous of incorporating a company pursuant to Section 3 should make an application to the Company Registrar's (Office), via electronic transmission with digital recording proposing the name of a company. Where the company Registrar is satisfied with the name of the proposed company it grants approval to it.

On obtaining the approval to the proposed name it should make an application to the Company Registrar's Office, in a prescribed format and accompanied by such fees as prescribed, and along with the required documents as prescribed.

Where an application is made for the incorporation of a company pursuant to Section 4, Section 5 of Company Act, 2063 states that the Office should, after making necessary inquiries and found compliance of all the required legal formalities for the registration of the company, give the decision as to the registration company of this Act and require to register such company within seven days as per the first amendment of the 2017 after the date of making of the application and grant the company registration certificate to the applicant, in the format as prescribed.

After a company has been registered, the company shall be deemed incorporated. The office shall maintain a company register in the format as prescribed. After the incorporation of a company under this Section, subject to this Act, the matters contained in the memorandum of association and the articles of association shall be binding on the company and its shareholders as if the provisions contained in separate agreements between the company and every shareholder and amongst its shareholders. Further it has also been mentioned that without registering a company under this Act, no person shall use the name company and carry on any kind of transaction by the name of any firm or institution.

iii) The Office has the power to refuse to register a company under Section 6 of this Act. Accordingly, 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 of a company in existence or trademark name in existence or mislead the existing company which 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 has not expired five years after such cancellation of registration or insolvency,

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

If the office refuses to register company in any of the circumstances as referred to in Sub-section (1) it should 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.

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 commercial branch of the concerned high court within fifteen days.

Question No. 9:

ABC Limited is listed in stock exchange and preparing the abstract of Financial Statements to be issued to its shareholders. The company has some confusion regarding the provisions of the Companies Act relating to the abstract of financial statements and its dissemination. Answer the following questions as per the Companies Act, 2063.

i) Is it necessary to send the annual financial statement and director's report to the shareholders?
ii) What is the basis and contents of the abstract of financial statement?
iii) What will be the compliance issue, if the Company chooses to publish the abstract of financial statement instead of sending to shareholders?

(December, 2019) (2+5+3= 10 marks)

Answer:

i) As per Sec 84(1) of the Companies Act, 2063 a company listed in the stock exchange shall not be required to send the annual financial statement and director's report to its shareholders or debenture-holders provided, however, that an abstract of financial statement prepared pursuant to Sub-sections (2) and (3) shall be sent to every shareholder along with the notice of annual general meeting.
ii) The abstract of financial statement required to be sent pursuant to the proviso to Sub-section (1) shall be prepared on the basis of the annual financial statement of the company and the

director's report. The format of such statement shall be as specified by the Company Registrar's Office based on the suggestions of the body specified to set accounting standards under the prevailing law. - Sec 84 (2)

Similarly, as per Subsection (3) of Section 84, abstract of financial statement contains, inter alia, the following matters:

(a) Matter indicating that the abstract of annual financial statement is only an abstract of the annual financial statement of the company and their director's report,

(b) An opinion of the company's auditor as to whether or not the abstract of annual financial statement is in consonance with the annual financial statement of the company and the director's report and whether or not the abstract is consistent with the format specified pursuant to this Section,

(c) Matter as to whether or not the auditor has made any remarks about the annual financial statement of the company and, if such remarks have been made, full details of such remarks and such materials as required to understand such remarks,

(d) In cases where the auditor has mentioned in his report anything about the inadequacy of the accounts and accounting returns or about the company's accounts not being verifiable with the records and returns maintained by the company or about the non-receipt of any such information and explanation as sought, full details thereof.

iii) Instead of sending the abstract of annual financial statement to the shareholders at their personal addresses, the company many publish it at least twice in a national daily newspaper at the time of publishing the notice of meeting. (Subsection (4) of Sec 84)

In the event of publication of the abstract of annual financial statement, there shall not be required to send the abstract at the personal addresses of shareholders. (Subsection (5) of Sec 84)

Hence, there is no compliance issue, if the company follows the above procedure to publish the abstract of financial statement.

Question No. 10:

A newly established public limited company has appointed you as a consultant with the specific purpose to manage the notice and meetings of the Board of Directors. The Company has sought your clarifications to the following issues in this regard. Clarify them in the light of the relevant provisions of the Companies Act, 2063Who should call the meeting of the Board of Directors?

i. Whether the Board of Directors can call the meeting of the Board?
ii. What is the total number of meetings the Board of Directors can hold in a year?
iii. What is the quorum required for a Board meeting?

[December, 2018] (10 Marks)

Answer:

Section 98 of the Companies Act, 2063 provides for the Notice of meeting of board of directors of the Company, as under:

i) As per section 98 (1), except as otherwise provided in the articles of association of the company, the company secretary or Chairman of the board or chief executive of the company shall call a meeting of the board of directors of the company.

ii) As per Section 98(2) of the Companies Act, notwithstanding anything contained in sub-section (1) above, if at least twenty five per cent directors of the total number of directors make written requisition, setting out the subject to be discussed in the meeting, for calling the meeting of the board of directors, the Chairman shall call the meeting of the board no later than 15 days of the receipt of such requisition. If the meeting of the board of directors is not called within that period, such requisition making directors themselves may call the meeting of the board of directors.

iii) The given company is a public limited company and as per Section 97 (2) meetings of the board of directors of a public company shall be held at least six times in a year. Provided, however, that the interval between any two meetings shall not exceed three months.

iv) As per section 97(4) of this Act, the quorum of the board of directors shall be at least fifty one per cent of the total number of directors of the company.
Provided, however, that any director who is not entitled to take part in any matter to be discussed in a meeting of the board of directors under this Act shall not be counted for the purposes of this sub- section.

Question No. 11:

Under the Articles of Association of a Mechanical Company Ltd., the directors of the company had power to borrow upto Rs. 5,000,000 without the consent of the general meeting. The directors themselves lent Rs. 10,000,000 to the company without such consent and took debentures. Is the company liable for Rs. 10,000,000? If not, for what amount? If any, is the company liable?

[December, 2018] (8 Marks)

Answer:

This issue is related to the question whether insiders are protected as third party for their transactions made with company exceeding their limitation on the powers of the board of directors under the company's constitution. The protection conferred on third parties does not apply fully to directors who enter into transaction with their company. In such case the transaction is voidable at the instance of the company under Section 103(2) of the Companies Act, 2063. In other words directors are not third party. Under Section 103(2) it is the duty of director or officer to do such transaction within the ambit of jurisdiction specified in the memorandum of association of the company.

The issue is related to the doctrine of indoor management. Thus the facts of this problem are based on the case of Howard vs. Patent Ivory Manufacturing Co (1888).In this case it was held that the directors had knowledge of the irregularity and hence company could not be held liable for anything more than the amount allowed to be borrowed under the Articles. Thus, in this case company can be held liable only for Rs. 50,00,000. The protection of the rule of indoor management cannot be claimed by one who has the knowledge of the indoor happenings. So

directors could not defend the issue which they were lending money to the company required the assent of the general meeting which they had not obtained.

Question No. 12:

Promoters of a limited company had signed an agreement for the purchase of certain assets for the company and payment was to be made to the suppliers by the company after its incorporation. Shortly, after incorporation of the company went into liquidation and the debt for the purchase of assets could not be paid by the company. As a result suppliers sued the promoters of the company for recovery of the dues. Examine this issue with reference to the provisions of the company Act, 2063 explaining whether promoters can be held liable for payment.

[June 2018] (5 Marks)

Answer:

Section 17 of the Companies Act, 2063 prescribes about the provision regarding such pre-incorporation contract. Section 17(1) prescribes that a contract made prior to the incorporation of a company shall be a proposed contract only, and such contract shall not be binding upon the company. It means, such pre-incorporation contract shall not be a contract enforceable by law. Section 17(2) prescribed that if, prior to the incorporation of a company, any person signs any contract to carry on any transaction or borrows money on behalf of the company, such person shall be personally liable for any contract related with the transaction so carried on. However, if within the time mentioned in any transactions or within the reasonable time after the incorporation of a company, the company, through its act, action or conduct, accepts any act, action or conduct, accepts any act, action to borrowing done or made prior to the date of authorization to commence its transactions or endorses such act or action, that transaction shall be binding on the company and the other contracting party; and the person carrying out such act to action shall be released from the personal liability to be borne.

However, in case of private company, the consensus agreement concluded among shareholders shall govern any contracts made prior to the incorporation of such company.

In the given context, the agreement signed by promoters to purchase certain assets before its incorporation is a pre-incorporation contract. In such case, no one can sue company for recovery of price under the contract. Instead, the person who entered into the contract before such company was incorporated shall be personally liable to perform it. Hence, any suffered party to the contract has to demand performance of contract to the person with whom he made contract, not to the company.

Question No. 13 :

Peoples' Technology Ltd. is willing to merge in Citizen Information Technology Ltd. Both companies have to do the merger process by passing the special resolution through their general meetings. You are appointed as a consultant on behalf of Citizen Information Technology Ltd. for

such special purpose. The company has required your opinion. As a consultant to the special purpose, furnish your opinion in the following matters in accordance with the Companies Act, 2063.

i. What is the special resolution?
ii. Do you think that the merger of company with other is the subject matter of the special resolution?
iii. What are the matters to be submitted in the general meeting as a special resolution?

[June, 2018] (2+2+6=10)

Answer:

i. A resolution which requires special support of the shareholders is called a special resolution. So, a resolution requiring the special majority to get passed in the general meeting is a special resolution. As mentioned in the proviso of the section 74(3), it is deemed to have been passed a special resolution by the meeting representing 75% of shares present and cast vote in favour of the resolution.
ii. The subject matter of merger of a company with other is submitted as an special resolution. As the section 83 and section 177 provided, a public company may, by adopting a special resolutions in its general meeting to that effect, be merged with another company. So, the merger of the Peoples' Technology Ltd. with given company is the subject matter of special resolution as mentioned the legal provisions.
iii. The subject matter, as provided in the section 83, including the merger of the company, to be presented in the general meeting of a company for decision on the following matters are as follows:
    (a) Increasing the authorized capital of the company,
    (b) Decreasing or altering the share capital of the company,
    (c) Altering the name or main objectives of the company,
    (d) Amalgamating one company into another company,
    (e) Issuing bonus share,
    (f) Buying back of own shares by the company,
    (g) Selling shares at a discount,
    (h) Converting a private company into a public company or vice versa,
    (i) Such other matter in respect of which the company is required by this Act or the articles of association to adopt a special resolution.

Apart from those, the following subject matters also be presented as a special resolution for the decision in general meeting.

a. Amendment to the Memorandum and Article of company,(Section 21).
b. The alteration in the rights of the shareholders of any particular class. (Section 30(6).
c. Any proposal to determine a call may not be made in respect of certain portion of its share capital not called on except in the case of liquidation or insolvency of the company. (Section 53(7)).

d. Grant a reward in a sum not exceeding three per cent of the net profits after payment of income tax to the directors who work full time for the company so as to encourage them. (Section 91(2) .
e. A Proposal to be rectified by the general meeting in forms of special resolution regarding any act or transaction done by a director beyond the authority conferred to him/her.
f. A proposal regarding transferring of property, borrowings more than the paid up capital and free reserve and making a contribution, donation or gift in a sum exceeding fifty thousand rupees in one financial year or a sum exceeding one percent of the average net profits of the company. (Section 105(1).
g. Liquidation of company (Section 126).

Question No. 14:

Nepal Micro Hydro Private Limited is extending its business by increasing its paid-up capital out of which more than fifty percent of the share of the company has been subscribed by a public company. The shareholders of the company have come up to one hundred in the course of extending its business. The board of directors of the company is in confusion if it is required to be converted it into a public company where the members and the paid up capital have been extended. The board then appointed you a consultant of the company to provide the suggestions to the board on the following questions considering the various provisions of Company Act, 2063.

ii) What were the mandatory requirements for conversion of a private company into a public company as per the Company Act, 2063 (Prior to the amendment in 2073[2])?

iii) How would you suggest the Company as per the request of the board with reference to the Company Act, 2063 (amendment in 2073[2]) pertaining to the private company?

[June, 2018] (10 Marks)

Answer:

i) Prior to the First amendment 2074 under Section 13(1)(b) and (c) of the Companies Act 2063, a private company is mandatorily required to be converted into a public company under any of following conditions:

a. If 25% or more shares of such company are held by one or more public companies,
b. If such private company acquires 25% or more shares of a public company.

This mandatory conversion provision had forced a private company to comply with all the requirements applicable to the public companies before applying for conversion to the office of Company Registrar. For instance:

a) Minimum paid up capital of 10 million or more,
b) Minimum number of shareholders to be raised to seven,

[2] 2073 has been rectified as 2074

c) Minimum number of directors to be three with a requirement to appoint at least one independent director

ii) As per the First Amendment of the Companies Act 2074 pertaining to the provisions of the private company, it can be suggested as follows:

1) Amendment in Section 9 of the Act:

Before the first amendment in the Act, the number of shareholders of a private company was maximum fifty. The First Amendment has extended this limitation to one hundred one.

However, the threshold of maximum number of the shareholders does not count in case of the employee shareholders who have subscribed shares of the company on the basis of employee share scheme**.**

In the given context, the shareholders of Nepal Micro Hydro Private Limited have come up to one hundred in the course of extending its business. Hence, in compliance with section-13 of Companies Act, 2063 (First Amendment), the company is not mandatorily required to be converted into public company just on the ground of increasing its to 100.

2) Amendment in Section 12 regarding private company carrying on specific nature transactions:

Notwithstanding anything contained elsewhere in this Act, a private company carrying on the business of telecommunication service provider with paid up capital more than five crore shall be converted into public company within two years pursuant to this section (i.e., within 2 years from Baisakh 19, 2074).

3) Amendment in Section 13 of the Act:

The first amendment has deleted clauses 1(b), 1(c), (4), (5), (6) and (7) under section 13 of the Act which had stated for mandatory conversion of a private company into public company due to intercompany shareholdings above than thereby prescribed limit.

In the given context, Nepal Micro Hydro Private Limited is extending its business by increasing its paid-up capital out of which more than fifty percent of the share of the company has been subscribed by a public company. Hence, in compliance with section-13 of Companies Act, 2063 (First Amendment), the company is not mandatorily required to be converted into public company just on the ground of purchasing shares by a public company more than 50% of its shares.

4) Amendment in Section 86 regarding limitation in maximum number of directors:

The flexibility allowed to a private company regarding the appointment of directors in desired number under Section 86(1) has been deleted by the First Amendment. As per Section-86(1) of the Act, the appointment and number of directors of a private company

shall be as provided in its article of association. Here, the First Amendment has added a proviso clause stating that the number of directors shall not be more than eleven.

5) Amendment in Section 76 of the Act:
The First Amendment in the Section 76 (5) has now included that if the article of association of any private company prescribes for holding annual general meeting, it shall hold the AGM within six months after the expiry of each fiscal year like a public company. If the company fails to call the AGM even within the time limit, the office may give direction to call the annual general meeting of such company. If the company fails to call the AGM even within three months after the receipt of the direction, any shareholder may make a petition, setting out the matter, to the court. Where such petition is made, the Court may either cause to hold the annual general meeting or issue any other appropriate order. In such case, the shareholders present in the general meeting called pursuant to the order of the court under shall be deemed to be a quorum.

Question No. 15:
Companies Act, 2063 with first amendment 2074 has added special provision for de-registration of the defunct and defaulting companies. Describe these special provisions referring the Act
[December, 2017] (5 Marks)

Answer:
Companies Act, 2063 with first amendment, 2074 has made a special provision relating to deregistration of the defunct or defaulting companies. Pursuant to section 136 of the Companies Act, de- registration of the defunct companies or defaulting companies are subject to the fulfillment of all the pending compliances and clearance of all the fines dues by the liable officers. The amount of fine as prescribed under section 81 of the Companies Act can be huge for the some of the companies which have remained defunct for several years.
The amendment has provided a grace period of two year from the date of commencement of the amendment to the defunct or defaulting companies to apply to OCR for the deregistration which have not fulfilled any of the following conditions as of the date of commencement of the amendment, (a) commence business, (b) submission of details pursuant to section 80, or (c) payment of fine under section81. A decision from the general meeting of such company is required to initiate the process.
The amendment has further prescribed the applicable government fees for such deregistration is (a) payment of fine under section 81, or(b) payment of zero-point five percent of the paid up capital of the company, whichever is less. For such deregistration, the defaulting companies will also need to submit the annual returns and other documents as provided under section 80.

Question No. 16:

Board of directors of XYZ Limited has decided to distribute Rs. 50 cash dividend and 5 bonus shares per existing equity share to the shareholders in fiscal year 2073/74. Explain the provisions of section 179 and 182 of Companies Act, 2063 and comments on the validity of the decision of the board in the above matters.

[December, 2017] (8 Marks)

Answer:

Section 179 of Company Act, 2063 has explained the issue of bonus shares to the shareholders. A company may by adopting a special resolution in the general meeting issue bonus shares to its shareholders out of the amount available for the distribution as dividend.

Where a company is to issue bonus shares, the company shall give information thereof to the Office before issuing such shares.

Section 182 of the act has explained the distribution of dividend by the company. The dividend shall be distributed to the shareholders within forty-five days of the decision made to provide dividend. The company is not bound to distribute the dividend within this time if any law prohibits the distribution of dividend, if the right to receive dividend is subject to any dispute or if in a circumstance beyond control of the company or for any reason, dividend cannot be distributed within the said time limit.

A company fully or partly owned by the Government of Nepal may distribute dividend only after obtaining prior approval of the Government of Nepal; and the Government of Nepal may give necessary directive on the matter of dividend to the distributed by such company.

In the event of failure to distribute a dividend within the time limit as referred to in sub-section 1, the dividend shall be distributed together with the interest thereon at such rate as may be prescribed.

The person whose name is maintained in the shareholder register at the time of declaration of a dividend or his legal heir shall be entitled to such dividend. A company shall not pay or distribute a dividend in any other manner except out of the amount of profits set aside for the distribution of dividend. Before declaring the dividend, the company should provide all expenses including depreciation, all allocable funds as per the requirement of the concerned act. Subject to the various provisions contained in this section, the board of directors of any company may, in the following circumstance distribute interim dividend out of the profit for the previous financial year if the article of association contain a provision on the distribution of interim dividend and the annual financial statement for the financial year out of the profits of which year interim dividend is to be distributed has already been certified by the auditor and approved by the board of directors. No company shall pay or distribute any amount in cash or kind, chargeable on its funds, to its shareholders, except a dividend approved by the general meeting.

Considering the above provisions, the act of board in XYZ Limited Company is not valid as directors cannot decided bonus shares. However board of directors may distribute interim dividend to the shareholders which should be taken post approval in the annual general meeting of the shareholders. In a given case the board has distributed bonus shares and cash dividend to the shareholders. This is not valid.

Question No. 17:

Ms. Sheela, a Chartered accountant licensed by ICAN has been appointed as an auditor of XYZ Trading Ltd. for the fiscal year of 2071/72. It has been revealed that she was appointed by the general meeting of the fiscal year of 2070/71 on the basis of recommendation of her maternal uncle's son who has been working in the company as general manager since last several years. Later, the appointment was questioned as the close relatives of an employee cannot be appointed as auditor in the company. Discuss referring to Companies Act, 2063 the validity of her appointment with disqualification of the auditor along with its consequences.

[December, 2017] (5 Marks)

Answer:

Under Section 111 of the companies Act, 2063, the auditor of a company shall be appointed, from amongst the auditor licensed to carry out audit under the prevailing law, by the general meeting, in the case of a public company. The auditor shall hold office until the next annual general meeting.

Section 112 specifies the disqualifications of auditor as follows:

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:

i) 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 employee of any of such partners or a close-relatives of a director or partner, out of them, or / and employee of such relative;
ii) 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;
iii) A person who has been sentenced to punishment for an offense pertaining to audit and a period of three years has not elapsed thereafter ;
iv) A person who has been declared insolvent;
v) A substantial shareholder of the company or a shareholder holding one percent or more of the paid up capital of the company or his/her close relative;
vi) A person who has been sentenced to punishment for an offense or corruption , fraud or a criminal offense involving moral turpitude and a period of five years has not elapsed thereafter;
vii) An auditor or his partner or ex- partner or employee or ex- employee who has already served as auditor for more than three consecutive terms,
viii) In the case of a public company, any person who works, whether full time or part time, for any governmental body or anybody 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;
ix) A company or corporate body with limited liability;

x) 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

Section 2(z9) defines the term close relative which means a partition shareholder in joint family or husband, wife, father, mother, mother in law, father in-law, elder brother, younger brother, elder sister, younger sister, sister in -law , elder or younger brother's wife, brother in –law, sister in –law, husband of elder sister, uncle, aunt, maternal uncle, maternal aunt, son, daughter, daughter in –law, grandson, granddaughter, granddaughter-in law or son in law.

On the basis of above legal provision maternal uncle's son does not contain under the definition of close relative, therefore, Miss Sita is not disqualified to be appointed as director of XYZ Trading Ltd.

Consequences:

Section 112 further states that the auditor shall, prior to his/her appointment, give information in writing to the company that he/she is not disqualified. 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 auditor who has been appointed in contravention of this section shall be invalid. Under Section 160(K) an auditor who knowingly carries out auditing of the concerned company even after that he/she is not qualified to carry out auditing of any company; shall be punished with a fine from twenty thousand to fifty thousand rupees or with imprisonment for a term not exceeding two years or with both punishment.

Question No. 18:

Mr. Ang Dami Sherpa, the Managing director of Khangsar Trekking Limited, is interested to know whether Khangsar Trekking Limited can buy back its own shares or not? If yes, what are the procedures mentioned in the companies Act, 2063?

[December, 2017] (10 Marks)

Answer:

Generally, no company can buy back its own shares. However, there are exceptions in section 61(2) of the companies Act that allows company to buy back its own shares. Section 61 states that no company shall purchase its own shares (buy-back) or lend money against security of its own shares. Exception to this provision is mentioned in subsequent sub-section which reads as notwithstanding anything contained in Sub-section (1), in the following circumstances, a company may buy back its shares out of its free reserves available for being distributed as dividends, by giving information to the Company Registrar Office.:

a) Where the shares issued by the company are fully paid up;

b) Where the shares issued by the public company have been listed in the Securities Board;
c) Where the buy-back of shares is authorized by the articles of association of the concerned company;
d) Where a special resolution has been adopted at the general meeting of the concerned company authorizing the buyback;
e) Where the ratio of the debt owed by the company is not more than twice the capital and general reserve fund after buy-back of shares; Explanation: For the purposes of this clause, "debt" means all amounts of secured or unsecured debts borrowed by the company.
f) Where the value of shares to be bought back by a company is not more than twenty percent of the total paid up capital and general reserve fund of that company;
g) Where the buy-back of shares is not in contravention of the directives issued by the Office in this respect.

So far as the procedure to buy back its own share is concerned, sub-section (3) of this section mentions that a special resolution to be presented at the general meeting pursuant to Clause (d) of Sub-section (2) above shall state the following matters:

a) The reason and necessity for the buy-back of shares;
b) A statement of the evaluation of possible impacts on the financial situation of the concerned as a result of the buyback of shares,
c) The class and number of shares intended to be bought back;
d) The maximum or minimum amount required to buy back shares as referred to in Clause (c) and financial source of such amount;
e) The time limit for the buy-back of shares;
f) The mode of the buy-back of shares;
g) Such other necessary matters as specified by the Office and as required to be disclosed under the prevailing law, in respect of the buy-back of shares.

As per Sub Section 4, of the above Section once the special resolution as referred to in Sub-section (3) is adopted by the general meeting, the concerned company may purchasing from the stock exchange or purchasing from the concerned employee of the company the shares allotted to him/her and purchasing from the existing shareholders on a proportionate basis buy back its shares within a period of twelve months of the adoption of that resolution

As per Sub Section 5, after it bought back its own share the company should notify the Office the number of shares bought back, amount paid for the same and other necessary details within thirty days of the date of such buy-back**.**

As per Sub Section 7, where a company buys back its shares pursuant to Sub-section (4), it shall cancel the shares so bought back within one hundreds twenty days of the date of such buy-back.

As per Sub Section 8, once a company buys back any class of shares pursuant to this Section, the company shall not re-issue the shares of that class, except for the issue of bonus shares or payment of its liability, prior to the expiration of two years after such buy-back.

As per Sub Section 9, notwithstanding anything contained elsewhere in this Section, no public company shall buy back its shares in a manner that such minimum number of shareholders or minimum paid–up capital as required to be maintained by that company becomes less or lower.
In this way, company Khansar Trekking may buy back its own share while fulfilling the conditions and procedures mentioned in section 61 of the companies Act, 2063.

Question No. 19:

Promise Commercial Bank was established to make the banking business in the country. It has more than 50 branches all over the country. The Bank was in profit and distributing the dividend to its shareholders annually. There were also preference shareholders in the Bank. Some of the preference shareholders wanted to come out from the Bank. But the Bank was reluctant to leave them. The Bank was in loss only in 2 years during its 10 years tenure. The preference shareholders were demanding the dividend as paid to them in the previous year

i. On what situation preference shareholders are protected?
ii. Whether the preference shareholders have the right to come out taking their investment?
iii. Whether the preference shareholders have the right to get the dividend where there was no profit?
iv. Which is the appropriate body to take the decision in aforementioned issue?
v. Which law is applicable in this issue?

[June, 2017] (5×2=10 Marks)

Answer:

i) During the continuance of the company it must be assured of a preferential dividend. The preferential dividend may consist of a fixed amount payable to preferential shareholders before anything paid to the ordinary shareholders. On the winding up of a company it must carry a preferential right to be paid, that is, the amount paid up on preference shares must be paid back before anything is paid to the ordinary shareholders. This preference, unless there is an agreement to the contrary, exist only up to the amount paid up or deemed to have been paid up on the shares.

ii) A company has the power to issue what are known as redeemable preference shares. There must, however be an authority to issue such shares in the Articles of Association and the Memorandum of Association of the company. Sections 30 and 65 of the Companies Act, 2063 have the provisions in this respect**.**

iii) Preference shares may be either cumulative or non-cumulative. If there is no profit in one year and the arrears of dividends are to be carried forward and paid out of the profits of subsequent years, the preference shares are said to be cumulative. But if unpaid dividend lapses, the shares are said to be non-cumulative preference shares. There must, however be an authority to issue such shares in the Articles of Association and the Memorandum of

Association of the company. Section 65 of the Companies Act, 2063 has the provisions in this respect. If the AOA and MOA clearly stipulates the provision to provide the dividend in the situation as mentioned above, they may get the same.

iv) The company being a legal person can act only through its directors. The general principles of agency, therefore govern the relations of directors with the company and of persons dealing with the company through its directors. Where the directors make the activities on behalf of the company, it is the company which is liable on it and not the directors. The board of directors is the body to make all such activities, pursuant to section 95(1) of this Act.

v) Provisions as prescribed by the Sections 30 and 95 of the Companies Act, 2063 are to be adopted while making the decision in these issues. According to Section 30, the company has power to issue various classes of shares with different rights by making provisions to that effect in its MOA and AOA. Accordingly under Section 95(1) the directors are entitle to manage the arrangements as prescribed in the MOA/AOA and perform their duties thereof. They are the key persons of the company, and are authorized to carry out the activities for the protection of all the shareholders.

Question No. 20:

The Chief Financial Executive of a Company prepared the financial accounts by overstating the assets and the profit for the purpose of declaring dividend to the shareholders and the same was presented to the Annual General Meeting. Discuss the consequence of his action under the Companies Act, 2063 and the Code of Ethics considering CEO being a Chartered Accountant and not being a Chartered Accountant

[June, 2017](10 Marks)

Answer:

Under section 102 of the Companies Act, 2063 explained that if any officer, knowingly giving false statements in the general meeting of a company instead of giving the actual situation of the company and encourage to distribute higher dividend to the shareholders of the company than that can be distributed from the real profits, thereby affecting the capital of the company, the officer giving such false statements shall be personally liable for such act.

Section 160 of the Company Act, 2063 has explained punishment with fine not exceeding 50,000 rupees or with imprisonment for a term not exceeding two years or with both if the officer who commits above mentioned offense. In a given case the chief financial executive of the company has caused loss to the company by mentioning higher profit in the financial statement of the company with mala fide intention or malicious recklessness.

Further, he may be asked along with the directors to compensate the company for the dividend or excess dividend paid out by the company as per Section 102 of the Companies Act, 2063. The false statement was signed by the auditor without qualifying the report and the same report was then presented to the general meeting by the Board of Director. Hence the auditor of the company is also liable under Section 160(c) of the Company Act, 2063 for punishment of fine and imprisonment as stated above.

If the Chief Executive is a member of Institute of Chartered Accountants of Nepal, on receiving the complaint, disciplinary proceedings can be taken against him and award further punishment of suspending him for certain number of years/months from membership or cancel the membership permanently depending on the seriousness of crimes under section 14(5) of Nepal Chartered Accountants Act, 2053. The Disciplinary committee of ICAN shall make recommendation, along with its opinion and finding, to the Council for taking necessary action against a member found guilty from its investigation; and the council may, in view of such recommendation, impose any of the following penalties to him:

- Reprimanding;
- Removing from the membership for a period not exceeding five years;
- Prohibiting from carrying on the accounting profession for any particular period;
- Canceling the professional certificate or membership

If chief finance executive as mentioned above is not a member of ICAN, his penalties will be limited to the provisions of the company act, 2063 only.

In the above case, the auditor has signed the false financial statement and the auditor of the said company is also liable. The Council of ICAN take action against statutory auditor of the company for negligence in his duties and may suspend his/her COP for certain period or cancel his/her COP permanently as per the Section14(5) of Nepal Chartered Accountants Act, 2053.

Question No. 21:

Companies Act, 2063 is in practice to regulate the companies, including incorporation and operation of the companies. What are the relevancies and objectives of the Industrial Enterprises Act, 2049 in connection to the governance of the Companies Act, 2063? Explain in brief.

[June, 2017](10 Marks)

Answer:

The main purpose of the Companies Act, 2063 is to facilitate the registration, incorporation, operation, including the provision of the meeting of the company, board of the directors etc. The purpose of other Acts relating to the business and industry is to create suitable environment for the promotion and the development of the business and industry in the country.

The main purpose of the Industrial Enterprises Act, 2076 is to make more facilitative, easy and encouraging industrial investment environment which will encourage competitiveness and enhances the productivity by flourishing the industries for the development of the country's economy. Chapter 5 of Industrial Enterprises Act, 2076 prescribes about special provisions made

for facilitating the industries. There is a close connectivity between the Companies Act, 2063 and the Industrial Enterprises Act, 2073.
The Industrial Enterprises Act, 2076 has made statutory provision regarding the corporate social responsibility. For this purpose, one percent out of the profit of an enterprise has to be made for the social purpose.

Question No. 22:
Hotel Nirmal (P) Ltd has conducted its extra-ordinary general meeting (EGM) to approve resolutions for amendment to memorandum of association and articles of association on request from shareholders. However, a group of shareholders, who were absent in the meeting, have challenged the legality of the EGM on the ground that the due process for calling the EGM was not followed. As a corporate consultant advice the company on the eligibility of shareholders to make a written request for convening the EGM and the process to be followed in this regard until the EGM is called by the Office of Company Registrar (OCR)

[December, 2016](10 Marks)

Answer:
Pursuant to Section 82 of the Companies Act, 2063, the board of directors of a company may convene an extra-ordinary general meeting if it deems necessary.
Shareholders holding at least ten percent shares of the paid–up capital of a company or at least twenty five per cent shareholders of the total number of shareholders are eligible to make an application, setting out the reasons therefor, to the registered office of the company for calling an extra-ordinary general meeting of the company. In such case the board of directors should call the extra-ordinary general meeting of the company.
If the board of directors does not call the extra-ordinary general meeting within thirty days from the date on which an application is made, the concerned shareholders may make a petition to the Office of the Company Registrar (OCR) setting out the matter; and if such petition is made, the OCR may cause to call such meeting.
The dissatisfied shareholders may present in the EGM so convened by the OCR and put their opinion on the agenda. However, they cannot object to the convening of the EGM as such.

Question No. 23:
CA. Pulkit Shah, a statutory auditor of M/s Adventure Company Ltd of fiscal year 2071/72 has committed certain offences as forbidden by Companies Act, 2063 during the course of audit of the Company. Now advise the Company by answering the following questions:

i) What are the functions and duties of an auditor pursuant to the Companies Act, 2063?
ii) What action can this company take against the auditor for committing offences?
iii) What are the punishments imposed against an auditor for his offences under the Companies Act, 2063?

iv) Can the Council of the Institute of Chartered Accountants of Nepal (ICAN) also take any action in this case against CA. Pulkit Shah, who is also a member of ICAN? If yes, what action can be taken?

[December, 2016](7 Marks)

Answer (i):

Section 114 of the Companies Act, 2063 requires a company which appointed an Auditor to audit its account, to do the followings:

The books of accounts and records of a company shall, on his demand, at any time during office hours be furnished to the auditor for the purposes of audit; and the concerned director or employee shall also forthwith give oral explanations on such matter as may be asked by him, within a reasonable period of time.

Functions and duties of an auditor have been provided under section 115 of the Companies Act, 2063, as under to which the Auditor Pulkit Shah is aware of:

(1) The auditor shall, addressing the shareholders or the appointing authority, submit to the company his report, certifying the balance sheet, profit and loss account and cash flow statement based on the books of account, records and accounts audited by him.

(2) The audit report shall be prepared in accordance with the prevailing law or in consonance with the audit standards prescribed by the competent body; and such report shall state the matters to be set out under this Act, as per necessity.

(3) The audit report as referred to in sub-section (2) above shall also indicate the following matters, inter alia:

(a) Whether such information and explanations have been made available as were required for the completion of audit;

(b) Whether the books of account as required by this Act have been properly maintained by the company in a manner to reflect the real affairs of its business;

(c) Whether the balance sheet, profit and loss account and cash flow statement as received have been prepared in compliance with the accounting standards prescribed under the prevailing law and whether such statements are in agreement with the books of account maintained by the company;

(d) Whether, in the opinion of the auditor based on the explanations and information made available in the course of auditing, the present balance sheet properly reflects the economic situation of the company, and the profit and loss account and cash flow statement for the year ended on the same date properly reflect the profit and loss, and cash flow of the company, respectively;

(e) Whether the board of directors or any representative or any employee has acted contrary to law or misappropriated any property of the company or caused any loss or damage to the company or not

(f) Whether any accounting fraud has been committed in the company;

(g) Suggestions, if any.

Answer (ii):

Pursuant to section 119 of the Companies Act, 2063, Adventure Company Ltd. can take the following action against the auditor Palkit Shah:-

If the auditor, Pulkit Shah breached the code of conduct of auditors or did any act against the interest of Adventure Company Ltd. which has appointed him as the auditor or committed any act contrary to the prevailing law, such auditor may be removed through the same process whereby he was appointed as auditor, by giving prior information to the Nepal Chartered Accountants Institute (ICAN), and with the approval of the regulatory authority, if any authorized by the prevailing law for the regulation of business of the company concerned , and failing such authority, with the approval of the Company Registrar's Office (CRO).

While removing the auditor as above, the auditor shall be provided with a reasonable opportunity to defend himself.

Answer (iii):

a) Section 160 of the Companies Act, 2063, has imposed the following punishment against the Auditor who commits the following offenses shall be punished with a fine from twenty thousand rupees to fifty thousand rupees or with imprisonment for a term not exceeding two years or with both punishments:
   (1) where the Auditor of a company states a false matter in his report in the course of carrying out his duty or omits necessary comments while making audit, with mala fide intention or malicious recklessness, such auditor (section 160 (c) of the above Act);
   (2) An Auditor who carries out auditing of the concerned company even after he knows that he is not qualified to carry out auditing of any company (section 160(k) of the above Act).

b) The Auditor who commits the following offense shall be punished with a fine from ten thousand rupees to fifty thousand rupees (section 161 of the Companies Act, 2063): the Auditor who does not present a report as specified in the above Act (section 161(d)).

Answer (iv):

Yes, ICAN can take disciplinary action against an Auditor under sections 35 and 14 of Nepal Chartered Accountants Act, 2053. Pursuant to section 35 of this Act:

Upon the concerned person of the company lodging complaint to the ICAN against the Auditor member holding Certificate of Practice for not upholding the conduct mentioned in or for violation of Nepal Chartered Accountants Act or Regulations framed under this Act. The Executive Director shall, if he is convinced with the complaint information that proves the Auditor member holding Certificate of Practice is not observing the code of conduct, submit the proposal along with the related facts to the Council for further action against such member.

The Disciplinary Committee constituted by the ICAN Council under section 14 of the above Act, shall inquire into the complaint.

The Disciplinary Committee shall make recommendation, along with its opinion and finding, to the Council for taking necessary action against a member if found guilty from its investigation;

and the Council may, in view of such recommendation, impose any of the following penalties on the concerned member (Pulkit Shah), according to the gravity of the offence:

(a) Reprimanding;
(b) Removing from the membership for a period not exceeding Five years;
(c) Prohibiting from carrying on the accountancy profession for any specific period;
(d) Cancellation of the Certificate of practice or membership.

Under section 22 of this Act, there is Provision of Removal of Names and Re-instatement of the membership accordingly.

Question No. 24:

Imperial Public Company decided to recover due amount of shares by making calls for payment to the shareholders. Accordingly, the company made calls for payment to the shareholders. However, Himal Sai, a shareholder of the company did not pay the due amount for his shares within the period called upon. On these background give the answer of the following questions

i) What procedure the company has to follow to make such calls for shares?
ii) What measures the company will take against Himal Sai to recover the dues on shares?

[December, 2016](7 Marks)

Answer (i):

For the payment of amount for shares, Section 53(1) and (2) of the Companies Act, 2063 require the following procedure to be complied by a company, to which Imperial Public Company must follow:-

(1) An amount for a share shall be paid up within the period of a call made in accordance with the articles of association.
(2) In making a call pursuant to Sub-section (1) above, the company shall send every shareholder a written notice, in the prescribed format, specifying a time-limit of at least thirty days and the installment payable by him/her, the place and time for payment. The public company shall also publish such notice, for at least three times, in a daily newspaper with national circulation.

Answer (ii):

Himal Sai, a shareholder fails to pay the sum called and payable in respect of the share within the period as referred to in section 53(2) above. In that case, in pursuance to section 53(3), (4) and (5) of the Companies Act, 2063, a notice shall be sent to him, giving an additional period of three months after the date of expiration of that period, and specifying clearly that if payment is made within that period, it shall be accepted, along with interest at the prescribed rate and if he fails to make payment even within that period, his share shall be liable to be forfeited. Such notice shall also be published in a daily newspaper with national circulation for at least three times. If the installment called is not paid even within the time-limit as mentioned in that notice, the company may forfeit all or the remaining shares after retaining the number of shares as fully paid up to the

extent of the amount paid up on the shares in respect of which the company has given such notice or also to the extent of the amount of dividends, if any, attached in respect of such shares.
Provided, however, that where the company has already undergone liquidation or insolvency prior to the forfeiture of shares, any amount due and payable in respect of the shares liable to forfeiture may be recovered as a loan in accordance with the prevailing law.
Where any share is forfeited under section 53(3) as above, the board of directors may refund the amount already paid up in respect of the share so forfeited and the amount equal to the dividends, if any attached in respect of such share, or issue the share to the extent covered by such amount; and where the amount is to be refunded, it has to be refunded within three months after the forfeiture of share.
In the event of failure to make refund within three months, interest chargeable on such amount after the expiration of that period shall also be paid. .

Question No. 25:
Ms. Safalata Mehra is one of the shareholders of Mero Petrochemicals Ltd. She holds 25,000 numbers of shares in the company, each of NRs 100 face value, for which NRs 50 each is called, but not yet paid. Despite extension of time limit for payment and also issue of public notice she still has not paid the called money. The company decided to forfeit all her shares though only 50% money is unpaid. She claims that the company's move to forfeit 100% shares is unlawful. Give your legal opinion on the same.

[June, 2016](5 Marks)

Answer:
As provided in Section 53(3) of the Companies Act, 2063, if a shareholder fails to pay the sum called and payable in respect of the share within the period as specified in the first call notice, the second notice should be sent to the concerned shareholder, giving an additional period of three months specifying clearly that if the payment is made within that period, it shall be accepted, along with interest at the prescribed rate, and if the shareholder fails to make payment even within that period, his/her share shall be liable to be forfeited. In the case of a public company, such notice should also be published in a daily newspaper with national circulation for at least three times. If the installment called is not paid even within the time-limit as mentioned in the second notice, the company may forfeit shares after retaining the number of shares as fully paid up to the extent of the amount paid on the shares in respect of which the company has given such notice or also to the extent of the amount of dividends, if any, attached in respect of such shares.
In the given case, Ms. Safalata Mehra has already paid 50% of the share amount. As mentioned above, the Companies Act, does not allow Mero Petrochemicals Ltd. to forfeit all her shares, but only the half of shares issued and allotted to her. The company should retain 12,500 number of shares fully paid and the remaining shares may be forfeited. Her claim is legally tenable that all her shares should not be forfeited, but only the shares for which she failed to pay.

Question No. 26:

Rebuild Kathmandu Ltd. holds 30 % shares in Eastwest Construction Ltd. and has appointed two directors Ms. Samanata Yogi and Mr. Sangharsha Rajgharana to sit on the board of Eastwest representing Rebuild. It has also appointed two more alternate directors, one of which is Mr. Sahaj Jeeban. When Ms. Samanata was out of the country for two months, Mr. Sahaj attended the board meeting in place of her. After she returned back to the office, Mr. Sahaj is still attending the meeting. Is this lawful? Give your opinion

[June, 2016](5 Marks)

Answer:

Section 87(2) of the Companies Act, 2063, provides that in case a corporate entity holds shares in a company, the corporate body may appoint directors in proportion of the total number of directors of the company and the number of shares subscribed by such body corporate and also an alternate director for each director to attend and vote in a meeting of the board of directors instead of the director in cases where such director will not be in a position to attend the meeting of the board for any reason.

Sub section (3) provides that where any director is not able to attend a meeting of the board of directors, such director shall give information thereof to his/her alternate director and the board of directors. In such case, the alternate director shall be entitled to attend, and vote in, the meeting of the board of directors. As provided for in Sub Section (4), an alternate director shall not be entitled to attend, and vote in, a meeting of the board of directors unless so informed by the director.

In the given case, Ms. Samanata is already back to office to be able to attend the board meeting. Further, there is no information by Ms. Samanata to the board of directors and Mr. Sahaj about her inability to attend the meeting after she has resumed the office. In such case, the attendance of Mr. Sahaj in the board meeting as an alternate director cannot be lawful.

Question No. 27:

Nagarjun Hotels Ltd. is a public company listed at Nepal Stock Exchange Ltd. It couldn't appoint its auditor in the Annual General Meeting (AGM). However, the Annual General Meeting delegated the power to appoint auditor to the Board of Directors (BoD) based on which the BoD appointed the auditor. Is this appointment valid? **[June, 2016](5 Marks)**

Answer:

According to Section 111(1) of the Companies Act, 2063, appointment of an auditor for a public limited company is the power and obligation of a general meeting of shareholders. There is no authority of the general meeting that it could delegate its power to the board of directors.

Nagarjun Hotels Ltd. is a public limited company. The general meeting of a private limited company can delegate its power to the board of director to appoint the auditor if the memorandum of association, articles of association or a consensus agreement had allowed it to do so.

Section 113 gives a solution to a case where the auditor could not be appointed in the general meeting. It states that in case an auditor could not be appointed in an annual general meeting for any reason or an annual general meeting could not take place or an auditor appointed in accordance

with the provision of the Companies Act could not continue for any reason, the Office of Company Registrar may appoint the auditor on request from the board of directors.
In the given case, the board of directors could request the Office of Company Registrar for appointment of auditor but in no case is allowed to appoint by itself regardless of the delegation of power. The appointment of auditor by the board of directors is not valid.

Question No. 28:
Paywell Insurance Ltd. is registered at the Office of Company Registrar (OCR). It has also applied with the Insurance Board for the license to operate a non-life insurance business. Pending the issuance of the license from the Board, it held its first annual general meeting which is objected by some of the shareholders on the ground that a public company having special objective cannot start its business activities unless license/permission is received from the concerned authority and a certificate of commencement of business is issued by OCR. Give your opinion on the issue.

[June, 2016](5 Marks)

Answer:
Section 63 of Companies Act, 2063 prescribes about the business commencement certificate as follows:

(1) No public company incorporated under this Act shall commence its business without obtaining the approval to carry on its business.
(2) A public company shall make an application, along with the evidence showing the full payment of calls on the shares, out of the amount of shares undertaken to be subscribed by its prompters, to the office for getting approval pursuant to Sub-section (1).
(3) Where an application is made pursuant to Sub-section (2) and if so proved that calls on the shares, out of the amount of shares undertaken to be subscribed have been paid, the Office shall grant approval for carrying on the business.
Provided, however, that if the amount paid up on shares is less than the amount mentioned in Sub-section (1) of section 11, the Office shall not grant such approval.
(4) Without obtaining approval to commence business pursuant to this section, there shall not be carried out any act of publishing the prospectus or creating liability except those acts such as convening the extraordinary general meeting, meeting of the board of directors & management of the company.
(5) Notwithstanding anything contained in Sub-section (2), where in the case of a company carrying on any specific business, the competent regulatory body empowered to regulate such business under the prevailing law has, while granting a license, specified any terms and conditions to be complied with prior to the commencement of such business, no approval to commence business shall be granted unless and until an evidence showing the compliance with such terms and conditions is submitted.
Further, section 76(1) of the Act prescribes that a public company shall convene its first annual general meeting within one year of obtaining the business commencement certificate.

In the given case, it is clear that Paywell Insurance Ltd. has not obtained license from Insurance Board and business commencement certificate from the Office of Company Registrar to commence its business. Hence, its First Annual General Meeting is not valid legally.

Question No. 29:

Is it a must for the public companies to appoint company secretary? What are the qualifications of the company secretary?

[June, 2016](2+3=5 Marks)

Answer:

As provided under Section 185(1) of the Companies Act, 2063 a company with the paid –up capital of ten million rupees or more should appoint to the post of company secretary a Nepalese citizen. It is not a must for all Public Limited Companies to appoint the Company Secretary. The type of a company, whether private or public, doesn't determine the need for the company secretary. It is the paid up capital which determines the requirement of a company secretary.

Sub-section (2) of the section 185 provides for the qualification of a company secretary. A Nepalese citizen, who has worked in the related field for at least two years after obtaining the professional certificate of company secretary issued by a local or foreign body authorized to issue the professional certificate of company secretary pursuant to the prevailing law or who has worked in the related field or in the field of company management for at least three years after doing at least bachelor degree in law, management, commerce or economics may be appointed to the post of company secretary.

Provided, however, that qualification requirement shall not apply to the company secretary, who is incumbent at the time of commencement of this Act for three years after the date of commencement of this Act.

A director of the concerned company shall not be eligible to be appointed as the company secretary of such company. It is also pertinent to note that a person shall not be appointed to the post of company secretary of more than one company at the same time except for the company secretary of any principal company to work as the company secretary of the subsidiary of such company.

Question No. 30:

XYZ, a public limited company has decided to merge with DTZ Private Limited. Explain what procedures the private company has to follow under the Companies Act, 2063 in order to accomplish such merger. Also explain the responsibilities of Company Registrar's Office in regard to merger of companies

[December, 2015](5 Marks)

Answer:

Section 177 of the Company Act, 2063 explained the procedures of merger of Companies. In pursuance to it, merger between public companies, between private companies, between public and private companies and vice versa is possible.

Procedure of Merger:

(1) A public company may, by adopting a special resolutions in its general meeting to that effect, be merged with a private company subject to Sub-section (3) below.
(2) A public company, upon merging into a private company shall stand as a public company.
(3) If a resolution for merger is adopted pursuant to Sub section(1) above, such public company shall, within thirty days , make an application, setting out the following matters to the Company

Registrar's Office (CRO) for approval:

(a) In the case of a public company, a copy of the decision of the general meeting as referred to in subsection (1) above;
(b) Last balance sheet and auditors report of the merging public company;
(c) A copy of the letter of consent in writing, of the creditors of the merging public company and of the merged private company;
(d) Valuation of the movable and immovable properties of, and actual details of the assets and liabilities of, the merging public company;
(e) If the merging public company and merged private company have made a decision as to the creditors and employees and workers of the merging public company, a copy of such decision;
(f) The scheme of arrangement concluded between the companies for merger with each other.

Responsibilities of the CRO as to the Merger:

(4) Where the information as referred to in Sub-section (3) above is given to the CRO, it shall study the matter and give information of its decision within three months.
(5) On receipt of an approval from the CRO for merger pursuant to Sub-section (4) above, all the assets and liabilities of the merging public company shall be deemed to have been transferred to the merged private company.
(6) The CRO shall maintain separate records of the merging public company in the company registration book.
(8) Notwithstanding anything contained elsewhere in this Section, the CRO shall not give approval for the merger of a company if such merger appears to create a monopoly or unfair trade restriction or to be contrary to public interest.

Question No. 31:

Can board of directors of a company decide to create differences in the rights between one to another group of shareholders? In case of such differences, if any other group of shareholders is not satisfied what will be the course of action? Explain. **[December, 2015](5 Marks)**

Answer:

Section 30 of the Company Act provides for shares with different rights and rights of such shareholders:

(1) The company may, by making provisions to that effect in its memorandum of association and articles of association, issue various classes of shares with different rights attached thereto.

(2) Except as otherwise provided in the articles of association of company, approval of the shareholders of any particular class shall be required to make any alteration in the rights of those shareholders of that class.

Provided, however, that no alteration may be made in the rights of the shareholders of any particular class in a manner to adversely affecting the rights of the shareholders of any other class.

(3) If the shareholders representing at least ten percent share of any particular class who are not satisfied with a decision to make alteration in the rights attached to the shares of that class pursuant to Sub- section (2) file a petition in the court to have the decision to make such alteration void, the decision made to make alteration in the rights of the shareholders of such class shall not be enforced unless and until otherwise decided or ordered by the court.

(4) A petition shall be made pursuant to Sub-section (3) within thirty days after the decision made to make alteration in the rights attached to the shares of any particular class; and any decision as referred to in Sub-section(2) shall not be enforced pending the expiration of that time limit.

(5) If it appears that alteration in the rights conferred to the shareholders of the class concerned is prejudicial to the rights of the petitioner shareholders, the court may quash the decision made on the alteration in the rights of the shareholders of that class.

(6) The board of directors shall submit a proposed resolution on the alteration in the rights of the shareholders of any particular class pursuant to Sub-section (2) to the general meeting of the shareholders of the concerned class; and such resolution has to be adopted as a special resolution by the general meeting.

(7) Notwithstanding anything contained elsewhere in this Section, in privatizing a company fully or partly owned by the Government of Nepal, as a shareholder, in accordance with the prevailing law on privatization, the Government of Nepal may have special voting right in making decision on the following matters, as provided in the articles of association, so long as the investment to the Government of Nepal is retained in such company:

(a) In making decision on a resolution to relinquish the title to an undertaking pursuant to Clause (a) of Sub-section (1) of Section 105

(b) In making decision on voluntary liquidation of the company,

(c) In making decision to amalgamate the company into another company.

In the given case, if nothing is provided in the AoA and MoA, with approval of the shareholders of any particular class and passing special resolution in general meeting, the company may make any alteration in the rights of those shareholders of that class. However, such alteration shall not adversely affect the rights of the shareholders of any other class. If at least ten percent

shareholders of any class who are not satisfied with a decision of alteration in the rights file a petition in the court within 35 days to have the decision to make such alteration void, the decision made to that effect shall not be enforced unless and until otherwise decided or ordered by the court. If it is found that the alteration is prejudiced the court may quash the decision.

Question No. 32:

Gemini Cricket Club is currently registered under Association Registration Act, 2034. The executive committee of the club has made decision to register this club under Company Act, 2063 as a non-profit distributing company. You as a consultant advise the committee on this matter.

[December, 2015](5 Marks)

Answer:

Company Act, 2063 has made provision for the registration of non – profit distributing company. Gemini Cricket Club and its executive committee have to follow the under mentioned provisions:

As per Section 166:

(1) Notwithstanding anything contained elsewhere in this Act, any company may be incorporated to develop and promote any profession or occupation or to protect the collective rights and interests of the persons engaged in any specific profession or occupation or to carry on any enterprise for the attainment of any scientific, academic, social, benevolent or public utility or welfare objective on the condition of not distributing dividends.

(2) Any person or trustee of a public trust registered pursuant to the prevailing law or any other corporate body incorporated pursuant to the prevailing law who wishes to register a company for the attainment or the objective mentioned in Sub - section (1) may make an application to the Office pursuant to Section 4.

(3) The number of promoters promoting a company pursuant to sub - section (1) shall be at least five; and after the incorporation of such company, it may have any number of its members, with a minimum of five members.

(4) The membership of a company incorporated pursuant to Sub - section (1) shall not be transferable in any manner. The membership of any person or body shall ipso facto be terminated in the event of death, cancellation of registration or dissolution of such member or amalgamation of such member with another body or company.

(5) Except with the prior approval of the Office, a company incorporated pursuant to Sub -section (1) shall not add words such "company :, "limited " or private limited at the end of its name.

(6) A company registered pursuant to Sub -section (1) shall obtain approval of the Office to expand its branch.

Following special provisions relating to company not distributing profits under Section 167 of the Act are also to be considered while registering the company:

Notwithstanding anything contained in this Act or the prevailing law, the following matters of a company incorporated pursuant to Section 166 shall be as follows:

b) There shall not be required share capital to incorporate a company not distributing profits.

Provided, however, that the company may receive membership fees from its members and receive any donation, gift pursuant to law for the accomplishment of its objectives.

c) No member of the company shall be liable for the debts and liabilities of the company except in the case where any member accepts such liability in writing the liability of the company, with specification of the limit of such liability; his / her liability shall be limited to the extent of that limit.
d) All the provisions of this Act as applicable to the listed company, other than those provisions which may be applicable only to the company with share capital, shall also apply to the company, its director, officer, auditor and employee.
e) The company shall not distribute dividend, bonus or any other amount, from the profits earned by it, to its members or employees; and the profits earned by the company shall be used to increase the capital of the company or for the attainment of its objectives.
f) The company shall obtain prior approval of the Office to change objectives.
g) Any company not distributing profits shall not be merged with any company distributing profits.
h) The members of a company incorporated under this Chapter shall elect the directors from amongst themselves in such number as fixed in the articles of association, on the basis of one member one vote.
i) The meeting allowance, salary, facility receivable by the officers or a company incorporated under this Chapter and the incorporation and operational expenses of the company shall not exceed the amount as specified by the Office; and in so specifying expenses, the Office shall have regard to the capital situation and profits of such company.
j) In the event of liquidation of or cancellation of registration of a company incorporated under this Chapter, the assets of the company, if any, remaining after the settlement of the debts and liabilities of the company shall be dealt with as per the provision, if any, contained in its articles of association, and failing such provision, such assets shall devolve on the Government of Nepal.

   Provided, however, that such assets shall, in no way, develove on anybody or company where a promoter or member of such company or his/her close relative or close relative of such relative is a promoter or member.

Question No. 33:

The Court had issued an order in favour of the resolution passed by the company regarding reduction of share capital. Some of the creditors claimed that their names were omitted in the list of creditors and they must be compensated by the shareholders who were yet to pay for the shares they had subscribed to make up the loss to the creditors. Is the creditors' contention valid? If so what is the extent of shareholders' liabilities?

[December, 2015](5 Marks)

Answer:

Section 59 of Company Act, 2063 has explained the liability of shareholders in such cases as follows:

(1) Except as otherwise provided for in this Section, a shareholder of the company, past or present, shall not be liable, in respect of any share mentioned in the order issued by the Court confirming the reduction of share capital, to pay any amount exceeding the difference between the amount actually paid on the share or the reduced amount, if any, which is deemed to have been paid thereon, as the case may be, and the fixed amount of such share.

Provided, however, that where the list of creditors entitled to object to the reduction of share capital submitted to the Court omits any such creditor and, after an order confirming the reduction of capital of the company has been made, the company is unable to pay the amount of debt of such creditor, the shareholder of the company shall be bound to pay the amount as mentioned in Sub-section (3) or (4).

(2) Notwithstanding anything contained in the provision to Sub-section (1), where the list submitted to the Court omits the name or any claim of a creditor because of a fault or negligence of his/her own, the shareholders shall not be bound to pay such amount.

(3) A person who was a shareholder of a company at the date of issue by the Court of an order confirming the resolution for reducing the capital of the company shall be liable to pay an amount not exceeding the amount which he would have been liable to pay if the company had undergone insolvency and commenced insolvency proceedings on the day immediately before the said date.

(4) If a company is insolvent, and where an application is made by a creditor whose name is said to be omitted from the list of creditors submitted to the Court, along with the proof of omission of his/her name, the Court may, if it thinks fit, settle a list of shareholders who are liable to pay to the company the amount required for the repayment of loan of such creditor and issue an order to make calls on shares held by the shareholders settled on such list as if they were ordinary contributors in an insolvency process of the company.

(5) Notwithstanding anything contained elsewhere in this Section, no shareholder shall be liable to pay an amount in excess of the face value of a share at the time of the subscription of such share by him/her.

The liability is up to difference between the amount actually paid on the share or the reduced amount, if any, which is deemed to have been paid thereon, as the case may be, and the fixed amount of such share. If the company is unable to pay the amount of debt of such creditor, the shareholder of the company shall be bound to pay either:

(i) A person who was a shareholder of a company at the date of issue by the Court of an order confirming the resolution for reducing the capital of the company shall be liable to pay an amount not exceeding the amount which he would have been liable to pay if the company had undergone insolvency and commenced insolvency proceedings on the day immediately before the said date.

Or,

(ii) If a company is insolvent, and where an application is made by a creditor whose name is said to be omitted from the list of creditors submitted to the Court, along with the proof of omission of his/her name, the Court may, if it thinks fit, settle a list of shareholders who are liable to pay to the company the amount required for the repayment of loan of such creditor and issue an order to make calls on shares held by the shareholders settled on such list as if they were ordinary contributors in an insolvency process of the company.

Question No. 34:

Drinking Water Development Board of Tuidang Municipality was established under the Development Board Act, 2013, and is desirous to convert the Board into company. What are the procedures to convert the Board into Company under the Company Act, 2063? Explain

[December, 2015][5 Marks]

Answer:

Section 173 of Company Act, 2063 has explained the conversion of corporation/board owned by government of Nepal into Company:

1) If the Government of Nepal wishes to convert a public corporation incorporated under the prevailing law, fully or partly owned by the Government of Nepal, or a development board formed under the Development Board Act, 2013 (1956) into a company, such corporation or board can be converted into a public company and incorporated under this Act.
2) Notwithstanding anything contained elsewhere in this Act, there shall be no restriction on the number of promoter, shareholders, in the incorporation of a company as referred to in Sub-section (1)
3) The movable and the immovable properties of the corporation or board as referred to in Sub-section (1) may be evaluated and converted into the share capital of the company to be incorporate pursuant to Sub-section (1), and where such conversion is made, all assets and liabilities of such corporation or board shall devolve on such company, except as otherwise provided in the articles of associations
4) Notwithstanding anything contained elsewhere in this Act, the number of directors of a company incorporated under this section shall be as specified in the articles of association of the company, and no such directors shall be required to subscribe any shares to become a director.
5) A company as referred to in this section may sell its shares in bulk to the private sector through the stock exchange or directly by negotiations.

   In such way, Drinking Water Development Board of Tuidang Municipality can be converted into the company under the Company Act, 2063.

Question No. 35:

'Adoption of written resolution' under Company Act, 2063

[December, 2015](5 Marks)

Answer:

Company Act, 2063 has provided special provisions to private companies and one of these provisions is related to the adoption of written resolution. Section 149 of the act has explained the conditions of written resolution as follows:

(1) Notwithstanding anything contained elsewhere in this act, except as otherwise provided in the articles of association, any act which can be done by adopting a resolution including a special resolution in the meeting of any particular class of shareholders can be done by a written resolution executed and signed by all shareholders representing at least seventy five percent shares, who are entitled to vote in holding discussion on such resolution on the same date on which such resolution is deemed to have been adopted.

(2) Where separate written resolutions have been recorded for any reason for the purposes of a sub-section (1) and all such documents have the same contents, it shall not be necessary that all shareholders sign the same document; and despite the fact that every shareholder has signed a separate document, such document shall be valid as if one written resolution were signed.

(3) Every shareholder signing a written resolution pursuant to this section shall date the same; and the last date on which the resolution is signed by the shareholder shall be deemed to be the date on which the resolution has been adopted.

(4) Any document attached to any written resolution shall be deemed to have been presented in a meeting of shareholders signing the resolution.

(5) Any resolution accepted pursuant to this section shall be recognized for any purpose whatsoever as it were a decision adopted by a general meeting of a company or a meeting of any specific class of shareholders.

Question No. 36:

Ms. Tarala Nepali is one of the shareholders in a bank from where she had borrowed a loan against the pledge or security of the shares held by her. She failed to repay the loan and the bank instituted legal action against her. It is claimed that since she is defaulter in repaying the loan she must be prevented from exercising voting right in respect of shares in the annual general meeting for a period until she repays the loan. What is your opinion?

[June, 2015](5 Marks)

Answer:

Section 70 of Company Act, 2063 has explained the cases of restriction on voting as follows:

(1) No person shall be entitled to attend and vote in any general meeting, in the capacity of a shareholder, either in person or by proxy on any discussion to be held in respect of any terms and conditions entered into or to be entered into between him/herself and the company.

(2) No director or his/her partner or his/her proxy shall be entitled to vote on any discussion to be held at any General Meeting in respect of the responsibility for any act done or omitted to be done or done wrongfully by him/her or in respect of his/her own appointment, dismissal, transfer or confirmation, with respect to the provision of , or reduction or increment in

remuneration, allowance or bonus or in respect of any agreement, contract or arrangement regarding his/her employment or anything in which his/her interest or concern is involved.

(3) Any shareholder who has not paid calls on the shares shall not be entitled to attend and vote in the general meeting.

(4) Where any shareholder appoints a director of the concerned company as his/her proxy pursuant to Sub-section(2) of Section 71, such director shall not be entitled to vote in the general meeting ,as a proxy of any one , on any matter in which his/her interest or concern is involved or on the matter of his/her appointment.

(5) Notwithstanding anything contained in this Act or the prevailing law, where a bank or financial institution incorporated under the prevailing law, which institutes legal action against a shareholder, who has borrowed a loan from such bank or financial institution against the pledge or security of the shares held by him/her, for his/her default in repaying the loan, writes to the concerned company to prevent him/her from exercising voting right in respect of shares, then the company shall prevent such shareholder from exercising voting right in respect of the shares held by him/her for a period until he/she repays the loan.

Section 71 of the Act further prescribes provision regarding right to vote in general meeting. According to it, the person whose name is registered as shareholder in the shareholder register book shall be entitle to attend the general meeting and cast the vote in the general meeting. Unless the Articles of Association prohibits, a shareholder who is entitled to vote is not able to personally attend the meeting, he/she may appoint a proxy to vote in his/her stead, by an instrument of proxy executed in the prescribed format and signed by him/her and the proxy so appointed shall be entitled to attend or vote in the meeting, subject to the provisions contained in Section 70.

As provided under section 70 (5) where a bank or financial institution incorporated under the prevailing law, which institutes legal action against a shareholder, who has borrowed a loan from such bank or financial institution against the pledge or security of the shares held by him/her, for his/her default in repaying the loan, writes to the concerned company to prevent him/her from exercising voting right in respect of shares, then the company will prevent such shareholder from exercising voting right in respect of the shares held by him/her for a period until he/she repays the loan.

In the given issue, it is claimed that since Ms. Tarala Nepali is defaulter in repaying the loan she must be prevented from exercising voting right in respect of shares in the annual general meeting for a period until she repays the loan is maintainable.

Question No. 37:

Blue sky Airways Ltd passed a special resolution to amend name and objective clause in it's memorandum of association and articles of association and also informed the same to the Office. However, one of the shareholders has objected over the change in objective of the company and has filed a petition at the court against the decision of the company. What are the provisions in the Company Act, 2063 to make such changes valid?

[June, 2015](5 Marks) [June, 2009](5 Marks)

Answer:

Section 21 of the Companies Act, 2063 prescribes the provision regarding the amendment of memorandum of association and articles of association as follows:

1) The general meeting of a company may, subject to Section 6, amend the memorandum of association or articles of association, by adopting a special resolution to that effect.
2) The company shall give information of any amendment made to the memorandum of association or articles of association pursuant to Sub-section (1) to the Office within thirty days; and the Office shall record the same and give information thereof to the concerned company, within seven days after the receipt of such information.
3) Notwithstanding anything contained in Sub-section (2), if any company has to amend its name, it shall adopt a special resolution to that effect at its general meeting and make an application, accompanied by the fees as prescribed, for prior approval of the Office: and if the Office gives approval to amend the names as per the application so received, the name of that company shall be amended.
4) If a shareholder of a public company who is not satisfied with an amendment made to the objectives of the company may, on fulfilling the following requirements, file a petition, setting out the reasons therefore, in the court to have that amendment declared null and void:
   k) A shareholder or shareholders holding at least five percent shares of the paid-up capital of the company, except the shareholders who consent to or vote for the amendment or alteration, has to make a petition,
   l) A petition has to be filed within twenty one days after the adoption of the resolution to amend the objectives of the company,
   m) Where anyone is to file a petition on behalf of one or more than one shareholder entitled to make petition, the petition has to be filed by a person who is authorized in writing for that purpose.
5) Unless and until the court is satisfied that the information about the contents, date, time and venue of a petition made under Sub-section (4) has also been given to the company, the petition shall not be heard. Provided, however, that if it appears from the documents submitted to the court that the concerned company has refused to acknowledge the notice, nothing shall prevent the court from hearing the petition.
6) Where a petition is filed in the court pursuant to Sub-section (4), the amendment made to the objectives of the company shall not be effective pending the final decision or order by the court in that matter.
7) On a petition as referred to in Sub-section (4), the court may issue an appropriate order, specifying the following terms and conditions:
   a) Declaring the amendment made to the objectives of the company to be fully or partly valid or void,

b) Requiring the company to subscribe for a reasonable value, the shares and other rights held by the shareholders making a petition under Sub-section (4), upon being disagreed with the making of alteration in the main objectives of the company,
c) The shares have to be subscribed under Clause (b) from the moneys as referred to in Sub-section(2) of Section 61; and in the case of a company which has no such moneys, issuing an order to decrease the capital of the company as if the share capital were decreased to the extent of such subscription by adopting a special resolution by the company; and where such order is issued, the company shall amend its memorandum of association and articles of association, subject to the provisions of this Act.

8) Notwithstanding anything contained elsewhere in this Act, where an order is issued by the court to fully or partly void the decision made by the company to amend its objectives, the company shall not be entitled to amend its memorandum of association or articles of association in that matter without permission of the court or in a manner contrary to the order of the court.
9) Where the memorandum of association or articles of association of a company is altered by an order of the court or the amendment made by the company is fully or partly endorsed by the court, such alteration or endorsement shall be enforced as if such alteration or endorsement were made by the general meeting of the company on its own.

In the given issue it is not clear, if the shareholder, who is not satisfied with the resolution passed regarding the amendment of objective clause, owns the shares at least five percent shares of the paid-up capital of the company, and the information about the contents is enough to proceed the case. If possess all required conditions, the court may entertain the petition and will be decided the case accordingly.

Question No. 38:

Prestige Public Company is involved in a controversy over convening its extra-ordinary general meeting. You as a legal consultant, advise the company as who and in what circumstances, they are entitled to make written request for convening an extra-ordinary general meeting of the company in case the board of directors of the company does not convene it? Explain

[June, 2015](5 Marks)

Answer:

Section 82 of Companies Act, 2063 prescribes about convening the extra ordinary general meeting as follows:

1) The board of directors of a company may convene an extra-ordinary general meeting if it deems necessary.
2) If, in the course of examining the account of a company, it is deemed necessary to call an extra ordinary general meeting for any reason, the auditor may request the board of directors to call such meeting; and if the board of directors fails to call the meeting accordingly, the auditor

may make an application, setting out the matter, too the Office; and if an application is so made, the Office may call the extra-ordinary general meeting of the company.

3) If the shareholders holding at least ten percent shares of the paid–up capital of a company or at least twenty five per cent shareholders of the total number of shareholders make an application, setting out the reasons therefore, to the registered office of the company for calling an extra-ordinary general meeting of the company, the board of directors shall call the extra-ordinary general meeting of the company within 30 days of the application.
4) If the board of directors does not call the extra-ordinary general meeting within the period pursuant to Sub-section (3), the concerned shareholders may make a petition to the Office setting out the matter; and if such petition is made, the Office may cause to call such meeting.
5) If the Office deems necessary to call an extra-ordinary general meeting in view of the findings of any inspection or investigation or for any others reason, it any itself call or cause there board of directors to call such meeting.

Question No. 39:

Board of directors of Apurna Limited wants to liquidate the company voluntarily. Under what circumstances the company can choose voluntary liquidation? Explain the procedures referring the provisions of Companies Act, 2063

[June, 2015](5 Marks)

Answer:

Pursuant to section 126 of the Companies Act, 2006, under the following circumstances and process, Apurna Company can be voluntarily liquidated:-

Except in case where a company has become insolvent in accordance with the prevailing law on insolvency, the shareholders of the company may liquidate the company either by adopting a special resolution in the general meeting or subject to the provisions contained in the memorandum of association, articles of association or consensus agreement.

The company may be liquidated under this Act in the following circumstance:

(a) If the company is able to pay its debts or other liabilities in full;
(b) If there exists no situation where an application for the review of insolvency of the company is pending under the prevailing law on insolvency or where the company would be in any manner subject to an insolvency proceeding under the prevailing law on insolvency;
(c) If the directors of the company, have, after due inquiry, made a declaration in writing that the company is able to pay its debts and other liabilities in full and that the debts and liabilities to be paid on behalf of such company can be paid up or can be fully settled in any other process within one year from the date of the adoption of the resolution to liquidate the company;
(d) If the written declaration made by the directors pursuant to Clause (c) above was presented in the general meeting called to discuss the matter of liquidation of the company or such declaration was made at the time of discussions on that matter in the general meeting.

A copy of the special resolution adopted with respect to the liquidation of the company pursuant to this Section and a written declaration of directors shall be submitted to the CRO no later than seven days after the date of adoption of the resolution.

While passing resolution for voluntary liquidation of the company, it is required to appoint a liquidator as well as an auditor.

Question No. 40:

Sripati, a shareholder of a private company wants to sell and transfer all his shares to Dhanpati, another shareholder of the company and wants your advice on the followings

i) Is Sripati entitled to sell and transfer all his shares to Dhanpati?
ii) Are there any restrictions imposed by law in the sell and transfer of shares?

[June, 2015](5 Marks)

Answer:

i) Section 42 of Companies Act, 2063 prescribes entitlement to sell and transfer shares as follows:

(1) The share or debenture of a company may be sold or pledged as good as movable property, subject to this Act, the memorandum of association and articles of association.

(2) Notwithstanding anything contained in sub-section (1), the promoter of a company, other than a private company which has not borrowed loan from any other company, shall not be entitled to sell or pledge any share held by him/her until the first general meeting of that company is held and a call on the share issued in his/her name is fully paid up.

So Sripati, a shareholder of the company is entitled to sell and transfer all his shares to Dhanpati, another shareholder of the company.

Further, section 43 prescribes about the process of such transmission of shares as follows:

1) If any share or debenture is sold, subject to Sub-sections(1) and (2) of Section 42, the buyer thereof shall make an application to the registered office of the company , in such format and along with such fees as may be prescribed, to have such debenture or share transmitted to his/her name. The applicant shall also submit, along with such application, a copy of the deed relating to the sale/purchase of share or debenture and share or debenture certificate.
2) If an application is made under Sub-section (1), the company shall cross off the name of transferor shareholder or debenture holder and enter the name of the transferee shareholder in the register within fifteen days after the making of such application.
3) Notwithstanding anything contained in Sub-section (1), if the prevailing law on securities transactions provides that no deed of transfer is required to transfer the title to the share or debenture of a company such deed shall not be required to be produced along with an application to be so made.
4) If a person who transfers any securities makes an application, also accompanied by a deed of transfer of share, signed by the purchaser to get the transfer of any share or debenture recorded,

the company shall register the name of share or debenture transferee in the shareholder register or debenture holder register as if such application was made by the transferee him/herself.

5) If any person acquires the title to any share or debenture by operation of any other provision contained in the prevailing law the provision contained in Sub-section(1), shall not be deemed to prevent the company from registering such person as a shareholder or debenture-holder.

ii) Section 44 of Companies Act, 2063 prescribes about the restrictions in the sell or transfer of shares as follows:

1) Notwithstanding anything contained in Section 42 or 43, a company may, in the following circumstances, refuse to record any pledge of a share in the register or to effect transmission of a share or debenture where it has been disposed of:

a) If a call on the share has not been paid up,

b) If such transmission will be contrary to the articles of association of the company or the agreement concluded between the shareholders,

c) If the transfer fee is not furnished along with the application.

2) In refusing to record the pledge of a share or debenture in the register or to effect transmission of a share of debenture under Sub-section(1), the company shall give information thereof to both the transferor and the transferee or the pledger and pledgee of the share or debenture within fifteen days from the date of making application.

Further, section 10(c) of the Companies Act, 2063 requires a private company not to sell its shares in public; it also means that a shareholder of a private company cannot sell its shares in public.

Question No. 41:

Nepsin Company Limited has decided to issue its shares to the general public. What legal requirements the company has to comply with for this purpose? Answer it in the light of the Companies Act, 2063 and the Securities Act, 2063

[June, 2015](5 Marks)

Answer:

Before issuing the securities to the public, a public company should publish a prospectus as per section 23 of the Companies Act, 2063 and section 30 of the Securities Act, 2063.

The securities have to be registered with the Securities Board prior to its issuance as per section 27 of the Securities Act, 2063.

Section 32 of the Companies Act, 2006 provides the following in this regard. Accordingly,

(1) While issuing its shares to the general public, a public company in this case, Nepal Public Company shall deal in the shares only through a securities dealer recognized to do securities transactions including all acts such as the sale, allotment and recovery of amounts of such securities.

(2) This public company shall file with the Company Registrar's Office (CRO) a copy of an agreement made by it on the dealing of securities through any body, within seven days after the date of making of such agreement.

The other matters in relation to public issue of shares have been provided under section 29 of the Securities Act, 2007, which are as follows:

(1) Where a body corporate is to sell and distribute securities to more than fifty persons at a time, it shall make public issue for the sale and distribution of such securities.
(2) The period to be open for making application of the securities to be issued pursuant to Sub-section (1) above shall be as prescribed.
(3) The provisions relating to the value and allotment of securities for which public issue has to be made shall be as prescribed.
(4) Where securities for which public issue has been made once could not be sold and have to be re-issued again within one year, the body corporate which so issues the securities may, with the approval of the Board, issue such securities by mentioning the matters which are different than the matters set forth in the previously published prospectus and the prospectus previously published.

Question No. 42:
Substantial shareholder and minor shareholder

[June, 2015](5 Marks)

Answer:
Substantial shareholders:
As per section 50 of the Company Act, 2063 substantial shareholders mean:
(1) If any person subscribes ordinary shares with full voting rights that are five percent or more of the paid up capital of any public company of which shares that person has held in his/her name or through his/her agent, that person shall be deemed to have his/her substantial shareholding in such company.
Provided, however, that in the case of a company having the paid up capital of more than two hundred fifty million rupees, any person shall be deemed to have the substantial shareholding despite that such person has subscribed one percent or more of the total paid-up capital of such company.
(2) A substantial shareholder of every public company shall give the company information setting out his/her name, address as well as full particulars of the shares registered in his/her or his/her agent's name, within thirty days after the knowledge of being a substantial shareholder of that company.
(3) If a person ceases to be a substantial shareholder of any public company, that person shall give the company information setting out his/her name, the date on which he ceases to possess the status of a substantial shareholder of that company and other particulars as well as the reason

why he/she has ceased to be a substantial shareholder, within thirty days after the date of knowledge of that matter.

(4) Every public company shall maintain a separate register for the purposes of Sub- section (1), (2) and (3).

Minor shareholders:

(3) A minor who has not attained the age of sixteen years and a person who is not qualified to make contract under the law shall not be eligible to become the promoter of a company.
Provided, however, that this Section shall not be deemed to prevent a minor or a person who is disqualified under the law to make contract from acquiring the title to the shares of a company subscribed by the promoter, by virtue of succession or operation of law.

(4) Where any minor or any person who is disqualified under the law to make contract is to purchase or sell any shares or debentures of any company, the father, mother or husband or wife or legally appointed protector or guardian of such person shall do so.

Question No. 43:

National Minerals Limited is a public company registered in Nepal and listed at Nepal Stock Exchange Limited. The management of the company has appointed you as a legal advisor and is seeking your opinion as to the format and contents of sending annual financial statement to its shareholders along with annual general meeting notice as required by the Companies Act, 2063. Give your opinion on the same

[December, 2014](5 Marks)

Answer:

Section 84 of the Companies Act, 2063 provides on sending abstract of financial statement to shareholders as follows:

(1) Notwithstanding anything contained elsewhere in this Act, a company listed in the stock exchange shall not be required to send the annual financial statement and director's report to its shareholders or debenture-holders.
Provided, however, that an abstract of financial statement prepared pursuant to Sub-sections (2) and (3) shall be sent to every shareholder alongwith the notice of annual general meeting.

(2) The abstract of financial statement required to be sent pursuant to the proviso to Sub-section (1) shall be prepared on the basis of the annual financial statement of the company and the director's report. The format of such statement shall be as specified by the Company Registrar's Office (CRO) based on the suggestions of the body specified to set accounting standards under the prevailing law.

(3) The abstract of financial statement shall contain, inter alia, the following matters:

(a) Matter indicating that the abstract of annual financial statement is only an abstract of the annual financial statement of the company and their director's report,

(b) An opinion of the company's auditor as to whether or not the abstract of annual financial statement is in consonance with the annual financial statement of the company and the director's report and whether or not the abstract is consistent with the format specified pursuant to this Section,

(c) Matter as to whether or not the auditor has made any remarks about the annual financial statement of the company and, if such remarks have been made, full details of such remarks and such materials as required to understand such remarks,

(d) In cases where the auditor has mentioned in his/her report anything about the inadequacy of the accounts and accounting returns or about the company's accounts not being verifiable with the records and returns maintained by the company or about the non-receipt of any such information and explanation as sought, full details thereof.

(4) Instead of sending the abstract of annual financial statement to the shareholders at their personal addresses pursuant to Sub-section (1), the company many publish it at least twice in a national daily newspaper at the time of publishing the notice of meeting.

(5) In the event of publication of the abstract of annual financial statement pursuant to Sub-section (4), there shall not be required to send the abstract at the personal addresses of shareholders.

In conclusion, the management of National Minerals Limited, a listed public company, may send abstract of its annual financial statement to its shareholders along with the AGM notice. The format of such notice shall be as specified by the Office of Company Registrar based on the suggestions provided by the body specified to set accounting standards. The abstract shall contain the matter as provided under subsection 3 (a) to (d) of section 84.

Question No. 44:

Danda Faya E-commerce Limited is facing liquidity crunch. It has got a long creditors' list. Some of these creditors are very big in amount and overdue for many years. The company entered into a settlement agreement with Suruchi, one of the big creditors to issue 10,000 numbers of shares at Rs 100 each against the amount due to her. Srijan, one of the shareholders of the company opposed the company's agreement with the creditor of issuing shares for the settlement of credit amount. And he claimed that he, being the existing shareholder, has the right to get right shares in proportion of the shares he holds in the company and demands to issue the proportionate number of shares agreed to issue to Ms. Suruchi to his name. Do you think his claim is valid?

[December, 2014](5 Marks)

Answer:

Section 56 of the Companies Act, 2063 has provision to issue shares to the creditors. As required by Sub-section (7) of Section 56 of the Companies Act, 2063, a public company shall publish a notice on the issue of right shares, which may be subscribed by the existing shareholders only, in a daily newspaper of national circulation for at least three consecutive times prior to fifteen days of the issue of such shares.

As per sub-section (8), the existing shareholders shall have the first right to subscribe the shares issued under Sub-section (7) above in proportion to their respective shareholding.
Notwithstanding anything contained in Sub-section (8) above, no shareholder of a company existing for the time being shall have the first right over the following shares to be issued by the company:

(a) Shares issued by the company for any consideration other than cash,
(b) Shares issued to any person under any right or facility provided in accordance with the terms of an agreement concluded with the company,
(c) Shares issued under an employee share scheme,
(d) Shares issued in accordance with an agreement concluded between the company and its creditors,
(e) Shares existed on converting preference shares into ordinary shares or debentures into shares by the company,
(f) Shares issued in accordance with an agreement between the concerned parties in the course of management of the company, restructuring of its capital or loan or in the course of implementation of a restructuring program agreed upon between the relevant parties in accordance with the prevailing law on insolvency or in the course of implementation of a program of conversion of a public company into another public company.

Provision under section 56 (9) (d) clearly provides that when there is an agreement with a creditor to issue shares to settle debts, the existing shareholders would not have right to claim proportionate shares. Hence, here in this case agreement with Ms. Suruchi is valid and the claim made by Mr. Sirjan is not valid.

Question No. 45 :
South Export Hydropower Limited is a public company. It has been holding annual general meetings regularly as provided. The last annual general meeting held was on 2071-05-15. However, it has not sent return of the annual general meeting to the Office for the last three consecutive years till 2071-07-15. The Office asked the company to submit such returns with penalty as per the provisions of the Companies Act, 2063. However, it did not pay the penalty either. On this ground, the Office is set to cancel the registration of the company. Can the Office do so?

[December, 2014](5 Marks)

Answer:
Section 80 of the Companies Act, 2063 requires Return of annual general meeting to be forwarded to Company Registrar's Office:
As per section 80(1) every public company shall, within thirty days of the holding of the annual general meeting, forward to the Office a return indicating the number of shareholders present in the meeting, a copy of the annual financial statement, director's report and auditor's report and resolution adopted by the meeting.

As per section 81 of this Act fine to be imposed in case of failure to submit returns are as follows:

1) Any return, notice or information required to be provided by the company to this Office or information required to be provided by the officer or shareholder to the company pursuant to this Act shall be provided by the director of the company or the officer or shareholder who has the duty to provide such return, notice or information to the Officer or the company, as the case may be, within the time limit, if any, prescribed by this Act for the provision of such return, notice or information.
2) The following director of a company or its officer who is in default in providing the return, notice, information or reply as referred to in Sections 51, 78, 80, 120, 131 or 156 of this Act within the time limit as referred to in Sub-section (1) shall be punished by the Registrar of the office with fine, as follows:

b) A fine of one thousand rupees if the paid up capital of the company is up to two million five hundred thousand rupees, a fine of two thousand rupees if the paid up capital of the capital is upto often million rupees, and a fine of five thousand rupees if the paid up capital of the company is more than ten million rupees, for a period not exceeding three months after the expiry of the time limit;
c) A fine of one thousand five hundred rupees if the paid up capital of the company is up to two million five hundred rupees, a fine of three thousand rupees if the paid up capital of the capital is upto ten million rupees, and a fine of seven thousand rupees if the paid up capital of the company is more than ten million rupees, for an additional period not exceeding three months after the expiry of the time limit as referred to in Clause (a);
d) A fine of two thousand five hundred rupees if the paid up capital of the company is upto two million five hundred thousand rupees, a fine of five thousand rupees if the paid up capital of the capital is upto ten million rupees, and a fine of ten thousand rupees if the paid up capital of the company is more than ten million rupees, for an additional period not exceeding six months after the expiry of the time limit as referred to in Clause(b);
e) A fine of five thousand rupees, for each year, if the paid up capital of the company is up to two million five hundred thousand rupees, a fine of ten thousand rupees , for each year, if the paid up capital of the capital is upto ten million rupees, and a fine of twenty thousand rupees, for each year, if the paid up capital of the company is more than ten million rupees, in cases where even the time limit as referred to in Clause (c) has also expired.

Section 136 of the Companies Act, 2063 provides power to the CRO to cancel registration of companies. As per section 136 (1) (b) The CRO may cancel the registration of a company if the company is in default in submitting to the CRO the returns as referred to in Section 80 or fails to pay the fine as referred to in Section 81 for three consecutive financial years.

As per section 136 (2) if it is required to cancel the registration of any company pursuant to Sub-section (1), the CRO shall, prior to the cancellation of registration, give a notice, accompanied by the reason for such registration, to the concerned company.

As per section 136 (5) If the company fails to make an application, specifying the reasons that the registration of the company should not be canceled, within two months from the date of receipt by the company of a notice pursuant to Sub-section (2) or, despite the making of such application, the reasons specified are not found reasonable, the registration of such company may be canceled.

In conclusion, since South Export Hydropower Limited failed to submit its annual return of AGM to the CRO for three consecutive years and also did not pay the fine imposed under section 81, the CRO may exercise its right to cancel the registration of the company as per the provision of section 136 (5) if the company fails to make an application within two months of the notice issued by the CRO as per section 136(2) specifying the reason for non-submission of the return or the reason mentioned in the application is not acceptable or reasonable in the eyes of the CRO.

Question No. 46:
The annual general meeting of ABC Limited has appointed CA. Jina as a statutory auditor for fiscal year 2069/70. In Shrawan 2070, CA. Jina resigned from the post of auditor due to her bad health. Now the company wants to appoint CA. Ruchika as the auditor of the company for the same year. What are the procedures that the company should follow to appoint a new auditor in this context?

[December, 2014](5 Marks)

Answer:
Section 113 of the Company's Act, 2063 has defined the conditions of appointing the auditors by the CRO as follows:

- Where the annual general meeting of a company fails to appoint an auditor for any reason or
- Where the annual general meeting itself cannot be held, or
- Where the auditor appointed pursuant to this Act ceases to continue his/ her office for any reason,

The CRO may, at the request of the board of directors of the company, appoint another auditor. In a given case, the board of ABC Limited should request to the CRO to appoint CA. Ruchika as an auditor. The CRO on the request of the board, may appoint such auditor.

Question No. 47:
Ernakulum Air - a foreign company, registered pursuant to Section 154 of Companies Act, 2053 is desirous to close down the transactions which it is carrying on in Nepal and get its registration cancelled. What are the procedures for the cancellation of registration and liquidation of a foreign company?

[December, 2014](5 Marks)

Answer:

Section 158 of the Companies Act, 2063 has defined the provisions of the cancellation of registration and liquidation of a foreign company as follows:

(1) Where a foreign company registered pursuant to Section 154 wishes to close down the transaction which it is carrying on in Nepal and get its registration canceled or where the competent authority, acting in accordance with the prevailing law, prohibits such company from carrying on the transaction or business within Nepal, such company shall make an application, accompanied by the prescribed fees, the office for the cancellation of its registration.

(2) A foreign company which makes an application pursuant to Sub - section (1) shall also submit, along with the application, an evidence and proof confirming that there is no liability due and payable by such company to any person, organization or governmental or non - governmental body in Nepal.

(3) In order to inquire whether the evidence and proof as referred to in Sub -section (2) are true or not, the CRO shall publish at least twice in a national daily newspaper a notice inviting a claim, accompanied by evidence, on any liability, if any due and payable by the company to any one, within a period of twenty one days.

(4) Where any person makes a claim in pursuance of the notice published pursuant to Sub - section (3), the concerned company shall submit to the CRO evidence or proof showing the settlement of such claim. Where the claim made against such company pursuant to Sub - section (1) cannot be settled from the assets of such company situated in Nepal, such company shall settle the same from its assets situated outside Nepal.

(5) Where no claim is made by anyone within the time limit as referred to in Sub - section (3) or a proof is submitted showing than the claim made has been settled pursuant to Sub - section (4), the CRO shall strike the name of such company off the foreign company register and give information thereof to the concerned company.

(6) Where an insolvency process is initiated in respect of a foreign company, which has been registered in Nepal pursuant to this Chapter, in accordance with the law of any country out of the countries where such company has been carrying on its transaction, the representative authorized by such foreign company pursuant to Section 157 shall promptly give a notice in writing thereof to the CRO, and he/ she shall also publish such notice in a national daily newspaper to be published from Nepal for the information of the general public.

Provided, however, that where an order for the cancellation of registration of such company has already been issued, such foreign company shall close its transaction or business in Nepal.

(7) Where any foreign company closes its transactions or business pursuant to the proviso to Sub - section (6), the prevailing law on insolvency shall govern the transaction or business carried on by such company in the State of Nepal.

Question No. 48:

Inspector under Company Act, 2063

[December, 2014](5 Marks)

Answer:

Section 121 of Companies Act, 2063 has provided Power to the CRO to appoint inspector on the following conditions.

(1) If the shareholders representing not less than ten percent of the paid up capital or not less than one - fourth of the total number of shareholders of the company or the concerned creditors make an application, accompanied by the supporting evidence and reasonable grounds, stating that the company has acted in contravention of this Act, the memorandum of association, articles of association, prospectus, consensus agreement or prevailing law, the CRO may, as per necessity, depute one or more inspectors. Such inspector shall be an expert in any of the subjects viz. accounts, law, finance, management, commerce, industry or company administration or any business which a company carries on the applicant shall deposit with the CRO such amount of estimated cost required for such investigation as specified by the CRO. However, such expert shall be the person having no any personal interest or stake at transactions of the concerned company.

(2) Notwithstanding anything contained in Sub - section (1) above, where the CRO is of opinion that the following circumstance does exist, it may, as per necessity, even if no application is made pursuant to Sub- section (1) above, appoint an inspector in possession of the qualification referred to in Sub - section (1), above to investigate the transactions or business of any company:

a) On the receipt of information that the business or transaction of the company is being carried on to defraud the shareholders or creditors of the company or otherwise for a fraudulent or illegal purpose or it is carrying out acts against public interest; or

b) Any public company has not furnished such information about its transactions as is required to be furnished.

Question No. 49:

Differentiate the reporting to the office under Section 51 with Section 78 of Companies Act, 2063.

[December, 2013](8 Marks)

Answer:

The given legal provisions are related to convene annual general meeting of the company. Section 51 of Companies Act, 2063 [First Amendment, 2074] is related to inventory of shares, debentures and loans whereas Section 78 is related to the report of the company to be submitted to the office in the course of convening annual general meeting.

Sections 78 of the Companies Act, 2063 prescribes the provision that every public company should prepare a report indicating the following matters and submit the same to the Office in advance of at least twenty one days before the holding of the annual general meeting. Such report has to be approved by the board of directors and certified by the auditor of the company.

(a) The total number of the shares allotted,
(b) Number of fully paid up and unpaid shared out of the allotted shares out of the allotted shares,
(c) Particulars of director, managing director, auditor, executive chief and manager of the company, and amount of remuneration, allowance and facility paid to them,
(d) The names of individuals or corporate bodies subscribing five percent or more of the paid up capital of the company, and details of shares or debentures held in their names,
(e) The total proceeds of the sale of shares, and particulars of the new shares and debentures issued and raised by the company in the financial year concerned,
(f) The amount due and payable by the director or substantial shareholder to his/her close relative to the company,
(g) The details of payment made or to be made against the sale of shares or for any other matters,
(h) The amount of loans borrowed from banks and financial institutions and of principal and interest due and payable,
(i) The amount claimed to be receivable by the company or payable by the company to any other person to details of, lawsuits, if any, ongoing in this respect,
(j) The number of employees engaged in the management of the company and at other levels,
(k) The number of expatriate employees engaged in the management of the company and at other levels, and remuneration, allowances and facilities paid to them,
(l) Where any agreement has been entered into between the company and any foreign body or person on investment, management or technical services or other matter for a period of more than one year, particulars thereof and the particulars of the dividend, commission, fee, charge and royalty, as well paid under such agreement in the financial year concerned,
(m) A statement of the management expenditures of the company in a financial year,
(n) The amount of dividends yet to be claimed buy the shareholders,
(o) A declaration that the company has fully observed this Act and the prevailing law,
(p) Other necessary matters.

Whereas Section 51 of the Companies Act, 2063 prescribes the provision regarding the inventory of shares, debentures and loans.
According to it, a company should prepare the inventory as follows:
(1) Every company shall, twenty one days prior to holding annual general meeting, prepare and maintain an inventory of the existing shareholders and debenture –holders and persons who ceased to be shareholders or debenture-holders as at thirty days prior to the holding of the annual general meeting.
(2) The inventory as referred to in Sub-section (1) spells outs, inter alia, the following particulars.
    (a) Authorized capital and number of shares of the company,
    (b) Issued share capital of the company,

(c) Paid-up capital of the company,

(d) Calls made on every share,

(e) Total amount of installments paid,

(f) Total amount due and recoverable,

(g) Total amount paid on share and debentures as brokerage,

(h) In the event of forfeiture of any shares, total number of such shares, reasons for forfeiture and date thereof,

(i) Loans borrowed from any bank, financial institution or any other person or guarantee furnished by the company,

(i1) If investment has been made in shares or debentures of other company, name & registration number of the company and investment amount in such shares or debentures.

(j) Names and addresses of the existing directors.

(3) The inventory referred to in Sub-section (1) shall be signed by at least one director and be submitted to the Office within 30 days after the date at which the annual general meeting of the company is held and, in the case of a company not holding the annual general meeting; within one year after the date at which the company has obtained permission to carry on such business if it requires permission of the concerned body pursuant to the prevailing law and after the date of registration where such permission is not required;

(4) A company not holding the general meeting shall submit inventory as referred to in sub section (1) to the Office within six months after expiry of each fiscal year.

(5) Notwithstanding anything contained elsewhere in this Section, if any company mentions the details as referred to in Sub-section(1), as well, in the report required to be submitted pursuant to Section 78, such company shall not be required to send a separate inventory to this Office under this Section .

Question No. 50:

Ms. Yemini Anand, one of the promoters of a proposed hydropower company visited a trade fair in Kathmandu. She found an attractive discount offer made by a trading company that sells hydroelectric equipment. She booked equipment required for the prospective hydropower company giving some advance from her own bank account since no company was formally registered. Later, the promoters registered a company named Bright Power Ltd. She was one of the shareholders but was not in the board. She submitted the payment slip and also the booking documents to the company. The company also collected the equipment from the trading company paying rest of the amount and installed the equipment at the site for operation. In the meantime, when she claimed reimbursement of the amount she had paid to the party, one of the directors

objected the payment. Is this objection valid? What will be the position of Ms. Yemini Anand as to the deal and payment she made?

[December, 2013](5 Marks) [June, 2011](5 Marks)

Answer:

This is a case of pre incorporation contract. Section 17 of the Company Act, 2063 contains provisions regarding such contracts that are as follows:

As per section 17(1), a contract made prior to the incorporation of a company shall be a proposed contract only, and such contract shall not be binding on the company.

As per section 17 (2), if, prior to the incorporation of a company, any person carries on any transaction or borrows money on behalf of the company, such person shall be personally liable for any contract related with the transaction so carried on, subject to Sub-section (3).

As per section 17 (3), if within the time mentioned in any transactions or within the reasonable time after the incorporation of a company, the company, through its act, action or conduct, accepts any act, action or borrowing done or made prior to the date of authorization to commence its transactions or endorses such act or action, that transaction creates the binding force on the company and the other contracting party; and the person carrying out such act or action will be released from the personal liability to be borne pursuant to Sub-section(2).

As per section 17 (4), notwithstanding anything contained elsewhere in this Section, the consensus agreement of a private company shall govern any contracts made prior to the incorporation of such company.

Brightlight Power Ltd is a public limited company. Hence, provision of section 17 (4) shall not be applicable in this case.

This case mainly attracts provision of section 17 (3). Here, Ms. Yemini Ananda entered in to contract to buy an equipment which she thought will be of use to the future company. The contract is made before incorporation of the company. This is very much a pre incorporation contract. However, later on the company, after being incorporated, has taken the ownership of that contract by way of action and conduct i.e. paying rest of the price, taking delivery and then finally installing the equipment at the site. It is an implied acceptance or ratification of the proposed contract. Thus, objection made by the director is not valid. Ms. Yemini Ananda is very much entitled to get reimbursement of the price paid by her on behalf of the company.

Question No. 51:

Alternative Power Ltd. passed a resolution to go for an issue of shares to the public against full guarantee of the Government of Nepal. The company also decided to issue certain securities to its' own employees. Board of directors of the company approached you regarding preparation and publishing of a prospectus for the issue. List out your suggestions referring the provisions of Companies Act, 2063

[December, 2013](5 Marks)

Answer:

Section 23 of the Companies Act, 2063, a public company requires the prospectus to be published before issuing its securities publicly. Similarly, Section 30(1) of the Securities Act, 2063prescribes the provision regarding the approval of the prospectus from the securities board for making the public issue.

However, this publication of prospectus is not required in certain circumstances.

Section 30 (2) of the Securities Act, 2063 prescribes that the prospectus is not required to issue for the issue of following securities:

i. Securities issued by Nepal Rastra Bank
ii. Securities issued against the full guarantee of the Government of Nepal.
iii. Securities proposed to be sold to up to fifty persons at a time,
iv. Securities issued to own workers or employees.
v. Securities permitted by the board as to issue and sell without issuing a prospectus

Accordingly, section 56(6) and Section 56(9) of Companies Act, 2063 prescribes the provisions where the prospectus need not be published in the following cases:

(a) Shares issued by the company for any consideration other than cash,
(b) Shares issued to any person under any right or facility provided in accordance with the terms of an agreement concluded with the company,
(c) Shares issued under an employee share scheme,
(d) Shares issued in accordance with an agreement concluded between the company and its creditors,
(e) Shares existed on converting preference shares into ordinary shares or debentures into shares by the company,
(f) Shares issued in accordance with an agreement between the concerned parties in the course of management of the company, restructuring of its capital or loan or in the course of implementation of a restructuring program agreed upon between the relevant parties in accordance with the prevailing law on insolvency or in the course of implementation of a program of conversion of a public company into another public company.

So in the given issue as Alternative Power Ltd is issuing securities against the full guarantee of the Government of Nepal issuing of a prospectus is not required, as per the proviso clause of section 30 (2) of the Act. Hence, there is no question of preparation of prospectus for Alternative Power Ltd.

Question No. 52:

Mr. Sadesh Singh, one of the shareholders of Fastrun Footware Ltd. was denied inspection of the shareholders registration book by the company because it had closed inspection for 40 days (Poush 17, 2069 to Magh 27, 2069) due to its impending annual general meeting. Is the company's action valid? Can shareholders demand copy of the registration book?

[December, 2013](5 Marks)

Answer:

Section 46(1) of the Companies Act, 2063 prescribes the provision regarding the maintenance of the shareholders register at its registered office. Similarly, Section 46(4) of the act prescribes the provision regarding the inspection of the register by the shareholders. However, the proviso to sub-section 4 of section 46 of the Companies Act, 2063 provides that a public company may by giving 7 days advance notice in a national newspaper, close inspection of the registration book for a maximum period of 45 days in one year but not exceeding 30 days at a time. Hence, the closure of registration book for a period of 40 days at a time and thus the denial of inspection to Mr. Sandesh Nayak by Fast run Footwares Ltd. is not legal.

Any person, if he/she so desires, may, except when inspection is closed, receive a copy of the registration book upon payment of the prescribed fee as per section 46(5).

Question No. 53:

Investor protection fund under the Companies Act, 2063 and investment fund under the Securities Act, 2063.

[December, 2013](5 Marks)

Answer:

Section 183 of the Companies Act, 2006 has provided for an Investor Protection Fund, as under:

(1) Where any investor does not present a claim to have refunded the amount invested in the shares of a company even within five years, there shall be established an investor protection fund to which such amount shall be credited.

(2) The amount credited to the fund established pursuant to Subsection (1) above, may be spent for the improvement in the capital market, investment policy, companies law or law relating to trade, business and profession, training to the employees of the CRO or the company or in any other activity relating to the company administration.

(3) The management and operation of the fund established pursuant to Sub-section (1) above, shall be as decided by a Committee consisting of the Registrar, the Chairperson of the Securities Board or his/her representative and one representative appointed by the Securities Board from amongst the organization operating the stock exchange.

(4) The CRO shall maintain the records of expenses made out of the fund established pursuant to sub-section (1) above and have the fund audited.

(5) Any amount obtained from the Government of Nepal, any donor agency or any person or body may also be credited to the fund established pursuant to Sub-section (1) above.

(6) Where any investor does not present a claim pursuant to subsection (1) above, prior to crediting the amount to the investor protection fund, a notice shall be published in a national daily newspaper inviting the concerned to receive such amount, within the time limit of at least one month.

Pursuant to section 2(r) of the Securities Act, 2006, Investment fund means a fund created out of amounts deposited by participants in a collective investment scheme in accordance

with a contract as has been taken in its custody by a scheme manager with an objective to provide an efficient investment service or assets related with such a fund, and this term also includes a fund which the scheme manager has taken in its responsibility in accordance with this Act or additional assets created from management of investment of assets and amount accumulated by way of consideration.

Question No. 54:

B Ltd. claimed that S Private Limited is the subsidiary of B Ltd. and T Private Limited is the subsidiary of S. Describe the basis of relation between these companies to justify the claim of B Ltd

[June, 2013](5 Marks)

Answer:

Company Act 2063 provides how a company is called holding and subsidiary. As per Sub-section 1 of Section 142 of the Company Act, 2063, holding companies may control its subsidiary company as follows:

(a) By holding direct or indirect control over the formation of the board of directors;

(b) By holding majority shares of the company.

Despite that the shares of a company are subscribed by any agent on behalf of the holding company or its subsidiary company or that the right to appoint directors of such company is exercised by any person nominated on behalf of the holding company or its subsidiary company, the conditions mentioned in Sub-section (1) shall be deemed to have been fulfilled. Provided, however, that while determining a holding company and a subsidiary company, the shares possessed in the following circumstances shall not be recognized for this purpose:

Hence potential relation as describe by B Ltd are as follows:

Relation between B Ltd and S Private Limited:

B Ltd either controls over the formation of the Board of S directly or indirectly or B Ltd holds majority of the shares of S Private Limited.

Relation between S Private Limited and T Private Limited:

S Private Limited either controls over the formation of the Board of T Private Limited directly or indirectly or S Private Limited holds majority of the shares of T Private Limited.

Relation between B Ltd and T Private Limited:

T Private Limited becomes subsidiary of B Ltd. because T Private Limited is the subsidiary of S Private Limited which is the subsidiary of B Ltd.

Question No. 55:

Company Registrar Office (CRO) has instructed Demure Limited, a public limited company, to submit the prospectus preparing as per the provisions of the Company Act, 2063. Demure is now asking you to advice on the following

i) Can CRO instruct to issue prospectus to them being the public limited company?
ii) Why and when this company is required to submit prospectus?
iii) Do all the directors of this company need to sign the prospectus?

[June, 2013](5 Marks)

Answer:

i) Company Registrar Office cannot instruct to issue the prospectus directly. Rather CRO just register it which is approved by the Securities Board in writing. However, CRO may refuse to register it, if it appears that any matters contained in the prospectus has not complied with the provision of the Companies Act, 2063.

ii) Section 23 of the Companies Act, 2063 provides that a public company shall publish its prospectus prior to issuing its securities publicly. Hence there is no mandatory provision to the public limited company of issuing shares to general public, Demure Limited being a public limited company, Demure is not required to issue prospectus unless it is decided to issue its shares to general public. If Demure is not issuing the shares to public it is not required to prepare and issue the prospectus.

iii) As per Section 23 of the Companies Act, 2063 and Securities Act, 2063, while publishing the prospectus, the prospectus must be signed by all directors including the chairman of the board of a company and same has to be submitted, along with a written application made to the Securities Board for approval. Hence all the directors are required to sign the prospectus.

Question No. 56:

Hundey Private Limited reduced its share capital by adopting a special resolution at the Annual General Meeting (AGM) and applied to Company Registrar Office for certification and recording; however, Company Registrar Office refused to grant certification and recording stating that Hundey cannot reduced its capital. Advise Hundey the reasons of refusal by Company Registrar Office and the steps ahead

[June, 2013](5 Marks)

Answer:

Section 57 of Companies Act, 2063 prescribes about the provision of share capital reduction as follows:

(1) If a company intends to reduce its share capital , it may, by adopting a special resolution to that effect at its general meeting, reduce its share capital by obtaining approval of the

Court and making necessary amendment to or alteration in the memorandum of association and articles of association, accordingly.

(2) On receipt of approval of the Court pursuant to Sub-section (1), the company may reduce its share capital as follows:

(a) By reducing the capital to such amount as has been paid up where calls for payment of amount on shares are not fully paid up,

(b) By paying back any paid-up share capital,

(c) By devaluating the face value of shares where the company has sustained a big loss or suffered a natural calamity.

(3) Notwithstanding anything contained in subsection (2), a company which has already become insolvent in accordance with the prevailing law shall not reduce its capital pursuant to this Section.

In the given case, method adopted by Hundey for reducing its capital was wrong. Approval of the court is needed to reduce the share capital instead of Company Registrar Office. Hence, Hundey needs to follow proper steps as above.

However, if Hundey has already become insolvent in accordance with the prevailing law then it shall not reduce its capital.

Question No. 57:

Mr. Jenish Jalan is the Chairman of the Board of Directors of the Tete Limited. He being the Chairman of the Board issued a letter to Mr. Harish appointing him in the post of Managing Director by giving him day to day management power, also fixing his remuneration as well. When the Chairman raised this issue in the board meeting for post approval, one of the directors opposed arguing that company never had intention to have managing director. Can the Board of Directors refuse the appointment?

[June, 2013](5 Marks)

Answer:

Any company may appoint Managing Director (MD) if article of association (AoA) permits for the same. Hence, it is to be checked if the AoA of Tete Limited has such provision. Further, Company Act, 2063 provides how appointment of managing directors can be made. Section 86 of the Act stated that the directors may, subject to the articles of association, appoint one managing director from amongst themselves. The functions, duties and powers of the managing director shall be as mentioned in the articles of association or as prescribed by the board of directors. First of all the Jamali Limited needs to check if article of association consist of these provision. Otherwise, it needs to amend the AoA by adopting special resolution at general meeting and obtaining approval of the Office of Company Registrar upon such amendment. Seeing the objection of a director it seems that there is no provision of MD in the AoA. Hence, the objection made by the director against the post approval agenda is valid one.

As to the Management of the company, managing director and other director talking responsibility of the management of the company may be appointed. Appointment is subject to an agreement. The term of agreement shall not exceed four years at a time. There shall be entered into an agreement in writing stipulating the terms of appointment, remuneration and facilities of the directors and managing directors; and no facilities or payment other than the remuneration and facilities specified in such agreement and any other facilities receivable as specified by the general meeting shall be provided or made. As per section 91 of Companies Act 2063, the meeting allowance to be receivable by the directors for attending a meeting, their monthly remuneration, daily allowance and traveling allowance or other facility shall be as determined by the general meeting. However, pending the holding of the first annual general meeting, the board of directors may determine the remuneration and facilities of the managing director or other directors who work full time for the company. Hence, the Chairman cannot fix the remuneration for the managing director.

Hence, Jamali first need to make necessary provision in Articles of Association about MD and make decision of appointment in the Board to enter into agreements.

Question No. 58:

Batas Airlines P Ltd was established on 2063/1/30 with a paid up capital of NRs. 50 million. However, the company could not get any airworthiness certificate nor bring any aircraft for the operation of internal flight in the country since its establishment. Even the company has also not audited its financial statement since the beginning nor submitted any documents to the Company Registrar's Office.

The Office has issued letter to comply with the provisions of the Companies Act, 2063 and to submit the required documents and the applicable penalties as per the Act. You, as a consultant, suggest the company management to the following matters:

a) How much penalty does the company has to pay till Ashad 31, 2069 as per the provisions of the Act?
b) Can the Office have power to cancel the registration of the company any time?
c) Which sections are attracted and what type of documents have to be submitted to comply with the provisions of the Act.

[December, 2012](8+7+5=20 Marks)

Answer (a):

Every private company should sign the inventory at least by one director as required by the Section 51 of the Companies Act, 2063 and should submit to the Company Registrar's Office within 30 days after the date at which the annual general meeting of the company is held and , in the case of a company not holding the annual general meeting within one year after the date at which the company has obtained permission to carry on such business as to require permission of the concerned body pursuant to the prevailing law, if the company carries on such business, and after the date of registration where such permission is not required; and if there is any alteration in the

inventory once it is submitted pursuant to this section, on the details of such alteration can be submitted.

The airline has not submitted any documents including the inventory to the Office and hence has to pay the penalties as calculated on the basis of the Section 81. As per the section, the fine is calculated as follows:

(a) A fine of one thousand rupees if the paid up capital of the company is up to two million five hundred thousand rupees, a fine of two thousand rupees if the paid up capital of the capital is up to ten million rupees, and a fine of five thousand rupees if the paid up capital of the company is more than ten million rupees, for a period not exceeding three months after the expiry of the time limit;

(b) A fine of one thousand five hundred rupees if the paid up capital of the company is up to two million five hundred rupees, a fine of three rupees if the paid up capital of the capital is up to ten million rupees, and a fine of seven thousand rupees if the paid up capital of the company is more than ten million rupees, for and additional period not exceeding three months after the expiry of the time limit as referred to in Clause (a);

(c) A fine of two thousand five hundred rupees if the paid up capital of the company is up to two million five hundred thousand rupees, a fine of five thousand rupees if the paid up capital is up to ten million rupees, and a fine of ten thousand rupees if the paid up capital of the company is more than ten million rupees, for an additional period not exceeding six months after the expiry of the time limit as referred to in Clause (b);

(d) A fine of five thousand rupees, for each year, if the paid up capital of the company is up to two million five hundred thousand rupees, a fine of ten thousand rupees, for each year, if the paid up capital is up to ten million rupees, and a fine of twenty thousand rupees, for each year, if the paid up capital of the company is more than ten million rupees, in cases where even the time limit as referred to in Clause (c) has also expired.

In the case of a company not distributing profits which is in default in providing such statement, information or notice within the time limit as referred to in Sub-section (1), the director or officer of such company shall be liable to the same fine as is imposable on a company of which paid up capital is up to ten million rupees.

Any director, officer or shareholder who is liable to pay the fine as referred to in Sub-section (2) shall pay it to the Office and submit to the Office or the concerned company such returns as required to be forwarded.

In calculating the period of expiration of the time limit pursuant to Sub-section (2), it shall be calculated from the date of commencement of this Act.

Any director, officer or shareholder of a company who is in default in providing such other statement, notice or information as is required to be forwarded to the Office pursuant to this Act shall be punished with a fine of two hundred rupees for every month, after the expiration of one month of the date of expiry of the time limit within which such statement, notice or information is required to be provided.

Provided that such fine amount shall not be more than Rupees one thousand in one fiscal year.

Answer (b):

(1) The Office may cancel the registration of a company under Section 136 if the following conditions are in existence as per the Companies Act, 2063:
   (a) If the promoter of the company makes an application, showing a reason for the failure to commence the business of the company, and accompanied by the prescribed fees, for the cancellation of the registration of the company:
   (b) If the company is in default in submitting to the Office the returns as referred to in Section 80 or fails to pay the fine as referred to in Section 81 for three consecutive financial years; or
   (c) If, based on the proofs received in the course of administration of the company, the Office has a reasonable ground to believe that the company is not carrying on its business or the company is not in operation.

(2) If it is required to cancel the registration of any company pursuant to Sub-section (1), the Office shall, prior to the cancellation of registration, give a notice, accompanied by the reason for such registration, to the concerned company.

(3) While sending a notice to a company pursuant to Sub-section (2), the notice shall be sent to the company at its registered office or to any office or such company if the address of the registered office of such company is not registered with the Office or if the office of the company is not located at the address registered and to the memorandum of association of the company if even address of such officer is not available to the Office or is not known.

(4) A notice given pursuant to Sub-section (2) shall also be published in a national daily newspaper, as per necessity.

(5) If the company fails to make an application, specifying the reasons that the registration of the company should not be cancelled, within two months from the date of receipt by the company of a notice pursuant to Sub-section (2) or, despite the making of such application, the reasons specified are not found reasonable, the registration of such company may be cancelled.

(6) If the registration of a company is canceled pursuant to Sub-section (5), information thereof shall be given to the concerned directors and shall also be published in a national daily newspaper.

(7) If the registration of a company is cancelled pursuant to Sub-section (5), if there exists any kind of liability of the company, the liability of the officer or shareholder of the company shall continue to exist; and nothing contained in this Section shall be deemed to bar the instituting of necessary legal action against them to have such liability fulfilled.

(8) The assets, rights, benefits or liabilities held in the name of the company at the time of cancellation of its registration pursuant to Sub-section (5) shall devolve on its shareholders in the proportion of their shareholding.

   Provided, however, that the title and ownership of any property which has been held by the company as a trustee in favor of any other person shall to devolve on the shareholders.

(9) If any debt to be repaid by or any liability to be performed/discharged by the company of which registration has been cancelled pursuant to this Section cannot be settled from the assets, rights, or benefits devolved on the shareholders pursuant to Sub-section (8), the shareholders, directors or officers who were involved in the management of such company and responsible for giving rise to the situation as referred to in Sub-section (1) shall personally bear such remaining loan or liability.

(10) A company of which registration is cancelled pursuant to this Section shall not be allowed to carry on any business by the name of the same company.

(11) Following the cancellation of registration of any company pursuant to this Section, the Office shall return to the shareholders only such property, if any, remaining after deducting therefrom the expenses incurred in the cancellation of the registration of that company.

Answer (c):

Section 51 of the Companies Act, 2063 [First Amendment, 2074] will attract for the submission of the documents. Section 78 is for public company and this is not applicable in case of a private company. Batas Airlines is a private company and whatever information the company has to submit to the Office is based on the information as mentioned in the Section 51 of the Act. As per the provisions of the Section, the following information should be furnished to the Office:

(3) Every company shall, twenty one days prior to holding annual general meeting, prepare and maintain an inventory of the existing shareholders and debenture –holders and persons who ceased to be shareholders or debenture-holders as at thirty days prior to the holding of the annual general meeting.

(4) The inventory as referred to in Sub-section (1) spells outs, inter alia, the following particulars.

(a) Authorized capital and number of shares of the company,

(b) Issued share capital of the company,

(c) Paid-up capital of the company,

(d) Calls made on every share,

(e) Total amount of installments paid,

(f) Total amount due and recoverable,

(g) Total amount paid on share and debentures as brokerage,

(h) In the event of forfeiture of any shares, total number of such shares, reasons for forfeiture and date thereof,

(i) Loans borrowed from any bank, financial institution or any other person or guarantee furnished by the company,

(i1) If investment has been made in shares or debentures of other company, name & registration number of the company and investment amount in such shares or debentures.

(j) Names and addresses of the existing directors.

(3) The inventory referred to in Sub-section (1) shall be signed by at least one director and be submitted to the Office within 30 days after the date at which the annual general meeting of the company is held and, in the case of a company not holding the annual general meeting; within one year after the date at which the company has obtained permission to carry on such business if it requires permission of the concerned body pursuant to the prevailing law and after the date of registration where such permission is not required;

(4) A company not holding the general meeting shall submit inventory as referred to in sub section (1) to the Office within six months after expiry of each fiscal year.

(5) Notwithstanding anything contained elsewhere in this Section, if any company mentions the details as referred to in Sub-section(1), as well, in the report required to be submitted pursuant to Section 78, such company shall not be required to send a separate inventory to this Office under this Section .

Question No. 59:

Promoters of a prospective company 'A' applied to the Company Registrar's Office (CRO) for its registration. Few days after filing the application the CRO refused its registration. Now in this context, answer the following questions in the light of the Companies Act, 2063:

i. State the circumstances under which the CRO may refuse registration of the prospective company 'A'.

ii. Have the promoters of the prospective company 'A' any legal remedy against such a refusal of registration?

[December, 2012](5 Marks)

Answer (i):

Pursuant to Section 6 of the Companies Act, 2063, the Company Registrar's Office (CRO) may refuse to register the prospective company 'A' in any of the following circumstances:

1) The Office may refuse to register a company in any of the following circumstances:
   (a) If the name of proposed company is identical with the name or trade mark of previously registered existing company 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 Sub-section (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 (i.e. Commercial Bench of the concerned High Court) within fifteen days.

Question No. 60:

Limi Hotel Limited, a public company established in Chhinchu and having paid up capital of Rs. 12 million, had purchased securities of KV Hotel Limited for Rs. 12 million. Whether the above transaction is as per Companies Act, 2063 assuming that Limi Hotel has Rs. 8 million free reserves in their account.

[Final/December, 2012](5 Marks)

Answer:

Section 176 of Companies Act 2063 [First Amendment, 2074] makes certain restriction on transaction between companies. Section 176 of Companies Act 2063 states that no company shall, where directly or indirectly, lend money to another company in excess of an amount that is sixty percent of its paid-up capital and free reserves or an amount to be set by hundred percent of its free reserves, whichever is the higher, give guarantee for a loan borrowed by another company or make investment in the securities of another company in excess of the said amount. Nevertheless, this provision shall not apply to a company carrying on banking or financial transaction, insurance company, company with main objective to buy and sell securities or make investment only, private company which has not borrowed any loan from a bank or financial intuitions, company with objective to provide infrastructure facility, and investment made by the holding company in its fully owned subsidiary company, money lent by such holding company to such subsidiary and guarantee given by such holding company for a loan borrowed by such subsidiary and investment made in right shares issued under this Act. A company shall maintain the details, as prescribed, on the moneys lent by it to another company, investment made by it in such company or guarantee given by it for a loan borrowed by such another company.

Question No. 61:

Tee Ltd., the subsidiary company of Pee Ltd., has sold its property, and has asked you to advise if Tee Ltd. or Pee Ltd. need to inform the Company Registrar's Office (CRO) about sold property. When and under what conditions does a company need to inform the acquisition or sold of property to the Office of Company Registrar? Also explain the matters to be given to CRO.

[Final/December, 2012](10 Marks)

Answer:

Section 141 of the Company Act, 2063 provides that under what condition a company needs to inform the company registrar office (CRO) while having acquisition or sale of property. A public company or its subsidiary company shall, if the purchase or sale of any property by it results in the following situation, give information thereof to CRO:

a) If the purchase of any property results in an increase in the value of its property or the value of consolidated property mentioned in the audited latest annual financial statement, by more than fifteen per cent;
b) If the income to be earned from the property sold or intended to be sold exceeds by more than fifteen per cent of the consolidated income before making payment for tax as mentioned in the audited latest books of account of the company.

Tee Limited is a public limited company, and therefore has to inform the CRO if above conditions occurs. Any information to be given to the CRO by Tee as above shall set out the following matters; and where such matters are also applicable in the case of transaction of the company, such matters shall also be stated in the report of board of directors:

a) Date of, and parties involved in, the transaction;
b) Details about the nature of property, and if that property includes, wholly or partly, any shares issued by any other company, the name of company issuing such shares and the nature of business to be carried on by that company;
c) Value of the transaction, and other terms and conditions of the transaction;
d) The ground pursued for the valuation of property, while buying or selling any property;
e) In the event of sale of any property, matter whether the proceeds of such sale is more or less than the book value of such property as shown in the records thereof.

Question No. 62:

Ordinary shares and preference shares.

[Final/December, 2012](5 Marks)

Answer:

i) Preference shares:

Section 65 of Companies Act, 2063 prescribes about preference shares as follows:

(1) A company may issue preference shares as provided for in this Act, memorandum of association or articles of association.
(2) Except as provided in the articles of association, no shares issued pursuant to Sub-section (1) shall be converted into ordinary shares.
(3) In issuing preference shares pursuant to Sub-section (1), the following maters, inter alia, shall be disclosed:
   (a) Whether preference is given to receive dividends against ordinary shares;
   (b) Percentage of dividends receivable by preference shareholders;

(c) Whether dividends get cumulated every year (cumulative) or profits are distributed only in a year wherein profit is made (non- cumulative);
(d) Whether preference is given while paying amount of share in the event of liquidation of company;
(e) Whether voting right is attached there to; and if voting right is attached, whether such right is available only in the case of preference share or also in other matters;
(f) Whether voting right is available also in other matters pursuant to Clause (e), the proportion to which such right is exercisable;
(g) Whether preference shares can be converted into ordinary shares;
(h) Whether the amount of preference shares can be redeemed (redeemable) or cannot be redeemed (irredeemable) after a certain period;
(i) Whether, in redeeming preference shares, premium is payable on redemption.

(4) Where any redeemable shares are issued, the shares shall not be redeemed unless they are fully paid.

(5) No amount of preference shares shall be redeemed except out of profits which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made by the company for the purposes of the redemption.

(6) Where a premium is payable on the redemption of any redeemable preference shares, there shall be provided for a separate fund out of the profits of the company or out of the company's shares premium account, for the purposes of redemption of such shares.

(7) Except in cases where any redeemable preference shares are redeemed out of the proceeds of a fresh issue of shares pursuant to sun-section (5), while redeeming preference shares pursuant to this Act, a capital redemption reserve account shall be established and a sum equal to the nominal amount of the shares redeemed shall be transferred to that account, out of profits which would otherwise have been available for dividend.

(8) The capital redemption reserve account established pursuant to Subsection (7) shall be maintained as if it were the paid–up capital.

(9) After the completion of the redemption of any preference shares redeemed pursuant to this Section, such shares shall be deemed to have, ipso facto, been cancelled.

(10) A company shall while redeeming any preference shares, follow such terms and procedures as provided by the articles of association of the company, subject to this Section; and such redemption of preference shares shall not be taken as reducing the amount of authorized share capital of the company.

(11) Where a company has redeemed or is about to redeem any preference shares, it shall have power to issue new shares up to the nominal amount of the shares so redeemed or to be redeemed.

(12) Where a company has redeemed any preference shares, the company shall give information thereof to the Office within one month of such redemption; and on receipt of such information, the Office shall record such information in the company register.

(13) Notwithstanding anything contained elsewhere in this Section, a company may issue new shares to its shareholders as fully paid bonus shares, out of the capital redemption reserve funds established pursuant to Sub-section (7).

ii) Ordinary shares: Any shares that are not preferred shares and do not have any predetermined dividend amounts. An ordinary share represents equity ownership in a company and entitles the owner to a vote in matters put before shareholders in proportion to their percentage ownership in the company.

Ordinary shareholders are entitled to receive dividends if any are available after dividends on preferred shares are paid. They are also entitled to their share of the residual economic value of the company should the business unwind; however, they are last in line after bondholders and preferred shareholders for receiving business proceeds. As such, ordinary shareholders are considered unsecured creditors.

Ordinary shares include those traded privately as well as shares that trade on the various public stock exchanges. Ordinary shares have a stated "par value", but this value is more of a technicality, and will rarely be more than a few pennies per share. The true value of an ordinary share is based on the price obtained through market forces, the value of the underlying business and investor sentiment toward the company.

Question No. 63:

NRB audit committee and audit committee as per Companies Act, 2063.

[Final/December, 2012](5 Marks)

Answer:

NRB audit committee**:**

Section 34 of the Nepal Rastra Bank Act, 2058 [Second Amendment, 2073] has defined an Audit Committee. As per the act the NRB Board shall constitute an Audit Committee comprising of the following members which will be accountable to the Board:-

(a) One Director designated by the Board-Convener

(b) Chief of Internal Audit Department of the Bank -Member

(c) One subject expert designated by the Board –Member

Section 35 of the same act has explained the functions, duties and powers of the NRB Audit Committee as follows: (1) (a) To submit its report and recommendations to the Board on accounts, budget and audit procedures and control system of the Bank; (b) To ascertain whether or not the audit and preparation of periodic balance sheet and other documents of the Bank have been carried out properly; (c) To supervise the implementation of the appropriate risk management adopted by the Bank; (d) To audit managerial and performance of works of the Bank in order to be assured that the prevailing laws applicable to the Bank have been fully complied with; (e) To frame bye-law for auditing of the Bank in accordance with the prevailing laws and international auditing standard and to submit it to the Board for approval. (2) The

Audit Committee shall, while submitting the report and recommendations to the Board pursuant to Clause (a) of Sub-section (1), furnish the information thereof to the Governor.

Audit Committee as per Companies Act, 2063:

Audit committee under Companies act means: Section 164 of the said act has defined Audit Committee as follows:

(1) A listed capital with paid up capital of thirty million rupees or more or a company which is fully or partly owned by the Government of Nepal shall form an audit committee under the Chairpersonship of a director who is not involved in the day-to–day operations of the company and consisting of a least three members .

(2) A person who is a close relative of the chief executive of a company shall not be eligible to be a member of the audit committee formed pursuant to Sub-section (1).

(3) At least one member of the audit committee shall be an experienced person having obtained professional certificate on accounting or a person having gained experience in accounting and financial field after having obtained at least bachelor's degree in accounts, commerce, management, finance or economics.

(4) The report of board of directors required to be prepared by a company shall set out a short description of the activities of the audit committee, working policies adopted by the board of directors to implement the suggestions, if any, given by the audit committee, the allowances or facilities, if any, received by the members or the audit committee and the names of the members of audit committee.

(5) The audit committee may, for inquiring into any matter, notify the managing director of the company, chief executive or the company or other director, auditor, internal auditor and accounts chief involved in the day-to-day operations of the company to attend its meeting; and it shall be their duty to be present in the meeting of that committee if they are so notified.

(6) The board of directors shall implement the suggestions given by the audit committee in respect of the accounts and financial management the company; and where any suggestion cannot be implemented, the board of directors shall also mention the reasons for the same in its report.

(7) A company shall arrange for such means and resources as may be adequate for the fulfillment of responsibilities of the audit committee; and the audit committee; and the audit committee may fix its internal rules of procedures on its own.

(8) The chairperson of the audit committee shall be present in the annual general meeting of the company.

(9) The audit committee shall meet as per necessity.

Question No. 64:

Balance sheet of General Estate P. Ltd. as at 31.03.2066 is given below (dealing in development and buying and selling of real estate properties like land and buildings).

Capital & Liabilities	Amount NRs.	Assets	Amount NRs.
Authorized Capital	100,000,000	Fixed Assets	5,000,000

Issued and Paid up Capital	50,000,000	Investment	20,000,000
General Reserve	10,000,000	Inventory	25,000,000
Accumulated Profit	5,000,000	Sunday Debtors	25,000,000
Long Term Bank Loan	15,000,000	Cash & Bank Balance	5,000,000
Total	80,000,000		80,000,000

In the last three years the Company earned net profits as below:

FY 2063/64 1,500,000 (Loss)
FY 2064/65 7,000,000 (Profit)
FY 2065/66 8,000,000 (Profit)

i) The Board of Directors of the Company wants to avail a long term loan of Rs.60 million to build infrastructure.
ii) Company wishes to donate Rs. 475,000 to an orphanage home.
iii) The company wants to lease out 75% of its properties.

Comment on the legality of the Company's proposals to borrow loan, make donation and lease out its properties.

[Final/June, 2010](10 Marks) [Final/June, 2012](10 Marks)

Answer:

As per Section 105 of The Companies Act, 2063 the Board of Directors of a public companies or a private companies availing a loan from banks or financial institutions, shall not except with a special resolution adopted by a general meeting, carry out the following activities:

a) Sell, donate, lease or otherwise dispose off more than seventy percent of one or more undertakings, operated by it,
b) Borrow money in excess of the total of paid capital and free reserve, except the loan and facility repayable within less than six months obtained in the ordinary course of business from banks and financial institutions,
c) Contribute, donate, gift for purpose of the companies fund except the contribution donation or gift for the purpose of the promotion of business of the companies or its employees in any amount aggregate to which in any financial year exceed one hundred thousand rupees or one percent of its average net profit during three previous financial years whichever is lower.

Though General Estate Pvt. Ltd. is a private company provisions of the section 105 will be attracted because it has availed loan from a bank assuming that the loan is a long term one. Let us now see the validity of the Acts of the Board of Directors under various situations as mentioned in the question as follows.

i) The total of paid up capital and free reserves of General Estate Pvt. Ltd. is NRs. 65,000,000.00. The companies already has a bank loan of NRs. 15,000,000.00 and now intends to borrow a loan of NRs. 60,000,000.00 which will make total loan of NRs.

75,000,000.00 which is more than NRs. 65,000,000.00. The Board of Directors cannot make such decisions. It must be decided by a general meeting passing a special resolution.

ii) The average profit in last three years is NRs. 4,500,000.00 [i.e. (8,000,000.00+7,000,000.00-1,500,000.00) /3] Amount to be donated is NRs. 475,000.00 it must be compared with NRs. 100,000.00 Or 1% of average profit of the last 3 years which is NRs**.** 45,000.00. The lower amount is NRs. 45,000.00. The proposed donation is more than the lower amount. Hence the board can not decide on such matter. It has to be passed through special resolution in general meeting.

iii) As provided in the proviso clause (1) of Section 105 (1) the title of a buyer who buys any property from the companies that deals in movable or immovable properties exclusively will be valid even if it is more than 70% of the value of undertaking. Since General Estate P. Ltd., is a company dealing on buying and selling of properties the decision made by The Board of Directors in this regard is valid.

Question No. 65:

Dahal Ltd. has not sent any reports to the Registrar of Companies for long including the change of the registered office address. The Registrar issued a public notice in a newspaper with wide circulation intending to cancel the name from the roster but the company could not reply it because the notice was published on "Nepal Banda" and the newspaper could not be delivered to the company. After 3 years of cancellation, the company management came to know that the company was already cancelled. What will be the impact of the transaction done during the period? Can it be revived? Discuss.

[June, 2012](5 Marks)

Answer:

Under Section 137 of the Companies Act 2063, deregistration of the company by the Registrar of Companies can be challenged within 5 years from the date of decision of deregistration in one case only. If the Registrar issued a notice having a reply period of 2 months intending to deregister the company but not replied by it or the Registrar is not satisfied with replies, Registrar can deregister the company. In the given case, OCR has sent the notice but the newspaper could not be delivered to the company due to Nepal Banda. The public notices were issued but the management was unaware of it and the OCR decided for deregistration. The transactions were done without notice of deregistration for 3 years.

In those cases, the company or its any shareholder or creditor may appeal to the court to revive the company within 5 years. The company can be revived upon the decision of the court in this favour. If the court decides so, all the transactions were deemed as done by a normal company and valid for law. The legal status of the company shall be deemed as perpetual within the period of deregistration as a normal company.

Question No. 66:

Siddhartha Incorporates Ltd., a public company wanted to convert itself into a private company. Siddhartha appointed you as a corporate consultant to provide it legal consultation in this matter. Now, advise Siddhartha Incorporate Ltd. on the following issues

a) Whether Siddhartha Incorporates Ltd. conversion into a private company is legally possible? If yes, under which circumstances (grounds) and law it is possible?
b) What legal requirements Siddhartha Incorporates Ltd. has to fulfill for such conversion?
c) After conversion into private company what will be the legal change in its name?
d) What happens to the assets and liabilities of Siddhartha Incorporates Ltd. after its conversion into a private company?
e) After conversion into a private company, is it legally possible for Siddhartha Incorporates to convert again into a public company?

[June, 2012](5*4=20 Marks)

Answer:

a) Conversion of Siddhartha Incorporates, a public company into a private company is legally possible under section 14 of the Companies Act, 2006 as under in the following circumstances:
    a. If the number of shareholders of this public company becomes less than seven,
    b. If the public company fails to maintain its paid-up capital under Section 11 of this Act or the paid-up capital as referred to in Section 11 is not maintained because of reduction in capital pursuant to Section 57 of this Act.
b) Siddhartha Incorporates, the public has to fulfill the following requirements of sections 14(2), (3) and (4) of the Companies Act, 2006:
    As per sub-section (2), in the event of occurrence of a circumstance as above, this public company shall make necessary amendments to its memorandum of association and articles of association and convert it into a private company within six months.
    As per sub-section (3), this public company shall make an application, accompanied by copies of the memorandum of association and articles of association amended and the prescribed fees, to the Company Registrar's Office (Office) for being converted into a private company, within thirty days after the making of such amendment.
c) As per sub-section (4), on receipt of an application, the Office shall mention in the company register the contents of conversion of such company into a private company and give a company conversion certificate, as prescribed, within sixty days.
d) As per section 10 of Companies Act 2063, the private company shall add the words "private limited'' to its name as the last words.
    In the event of conversion of any public company into a private company pursuant to section 14(4) of the Companies Act, 2006, all the assets and liabilities of this public company to be so converted shall devolve on the successor private company.
e) Yes, it is legally possible to convert it again into a public company provided it fulfills the legal requirements of section 13 of the Companies Act, 2006.

Question No. 67:

Syada Yarsha Processing Industries (P) Limited with seven million rupees of paid up capital has a turnover of rupees twelve million in FY 2067/68.

The Board of Directors of the Company has got the financial statements prepared and approved on Bhadra 10, 2068 that included balance sheet, profit & loss account and the cash flow only. The company held its annual general meeting on Aswin 1, 2068 where following general agendas were presented and approved by the annual general meeting:

a) Approval of the financial statement & audit report for FY 2067/68.

b) Appointment of the auditor for FY 2068/69

Do you think that the agendas as presented to the annual general meeting were complete? Give your opinion as to the validity of the annual general meeting referring the provisions of Companies Act, 2063.

[Final/June, 2012](10 Marks)

Answer:

As per section 77 of Companies Act 2063, the directors shall present the audited annual financial statements, auditor's report and director's report at the annual general meeting of a public company.

As per Section 109 (1) of Companies Act, 2063, annual financial statements shall be prepared by the board of directors of a private company every year within six months of the expiry of its financial year that include :

a) Balance sheet as at the last date of the financial year.
b) Profit and loss account of the financial year.
c) Description of and cash flow of the financial year.

As per Section 109 (4), the board of directors of every private company with the paid-up capital of ten million or more or with an annual turnover of ten million rupees or more shall also prepare a separate report of board of directors during that period stating the following matters, in addition to the annual financial statements required to be prepared pursuant to sub-section (1):

a) Review of the transactions of the previous year;
b) Impact, if any, caused on the transactions of the company from national and international situation;
c) Achievements in the current year as at the date of report and opinions of the board of directors on matters to be done in the future;
d) Industrial or professional relations of the company;
e) Alteration in the board of directors and the reasons therefore;
f) Major things affecting the transactions;
g) If there are any remarks in the audit report, the comments of the board of directors on such remarks;
h) Amount recommended for payment by way of dividend;

i) In the event of forfeiture of shares, details regarding the number of forfeited shares, face value of such shares, total amount received by the company for such shares prior to the forfeiture thereof, proceeds of sale of such shares after the forfeiture thereof, and refund of amount, if any, made for such forfeited shares;
j) Progress of transactions of the company and of its subsidiary company in the previous financial year and review of the situation existing at the end of that financial year;
k) Major transactions completed by the company and its subsidiary company in the financial year and any material changes taken place in the transactions of the company during that period;
l) Disclosures made by the substantial shareholders of the company to the company in the previous financial year;
m) Details of shareholding taken by the directors and officers of the company in the previous financial year and, in the event of their involvement in share transaction of the company, details of information received by the company from them in that respect;
n) Details of disclosures made about the personal interest of any director and his close relative in any agreement related with the company during the previous financial year;
o) In the event that the company has bought its own shares (buy-back), the reason for such buy-back, number and face value of such shares, and amount paid by the company for such buy-back;
p) Whether there is an internal control system in place or not; and details of such system, if it is in place;
q) Details of total management expenses during the previous financial year;
r) Name-list of the members of audit committee, remuneration, allowances and facilities received by them, details of the functions performed by that committee, and details of suggestion, if any, made by that committee;
s) Amount, if any, outstanding and payable to the company by any director, managing director, chief executive, substantial shareholder or his close relative or by any firm, company, corporate body in which he is involved;
t) Amount of remuneration, allowances and facilities paid to the director, managing director, chief executive and officer;
u) Amount of dividends remaining unclaimed by the shareholders;
v) Details of sale and purchase of properties pursuant to Section 141;
w) Details of transactions carried on between the associated companies pursuant to Section 175;
x) Any other matters required to be set out in the report of board of directors under this Act and the prevailing law;
y) Other necessary matters;

In the given case, though paid up capital of Syada Yarsha Processing Industries P. Ltd is less than Ten million, its turnover is more than Ten million. Its board of directors' annual financial statement must also include a separate report as prescribed under Section 109 (4). Since, the director's report doesn't include such separate report it is not complete. Preparation of such financial report in case

of private company may be done within six months of the fiscal year end. In the given case such statement is signed by the directors on Bhadra 10, 2068 i.e. one month and 10 days from the year end and is within time. In case of time, there is no maximum number of days gap prescribed by law between the date of AGM and preparation of such financial statement.

Question No. 68:

Middletown Fabrics Ltd. is a Brazilian company that wants to start some business activities in Nepal. Senior management of the company is working on the options as to how to enter in Nepal. Two of the options are "participating in the management of one of the Nepalese industries" or "enter into work contract with a competent body in Nepal". Middletown management seeks your expert advice as how to establish any office and get registered so as to operate the opted and other business in Nepal.

[Final/June, 2012](10 Marks)

Answer:

Section 154 of the Companies Act, 2063 provides for foreign companies as follows:

(1) No foreign company shall carry on any business or transaction in the State of Nepal without having a branch office of such company registered with the Office pursuant to this Section or establish such office without having a liaison office registered.
Provided, however that making investment in shares in any company established pursuant to law, lending, moneys to such company or participating in the operation or management of such company, with the approval of the competent body, shall not be deemed to be carrying on of a business or transaction for the purposes of this Chapter.

(2) A foreign company desiring to have its branch office registered pursuant to sub-section (1) shall make to the Office an application, accompanied by the permission obtained from the concerned body pursuant to the prevailing law, and the prescribed fees and in such format as prescribed, for the registration of such company.

(3) A foreign company desiring to have its liaison office registered pursuant to sub-section (1) shall make to the Office an application, accompanied by the permission, if any, required to be obtained from the concerned body pursuant to the prevailing law for the registration of such office, and the prescribed fees and the registration of such office, and the prescribed fees and in such format as prescribed, for the registration of such company.
Explanation: Where any foreign company is selected by any competent body pursuant to the prevailing law or events into contract with any competent body, for doing any work in Nepal, the making of such selection or entering into such contract shall, for the purposes of sub-sections (1) and (2), be deemed to be the permission given by the concerned body.

(4) On receipt of an application made for the registration of a foreign company pursuant to sub-section (2) or (3), the Office shall make necessary inquiry, register such company and give the registration certificate, as prescribed, no later than thirty days after the making of the

application for carrying on a business or transaction in or establishing a liaison office in the State of Nepal.

(5) Where a foreign company cannot be registered pursuant to an application made under sub-section (2) or (3), the Office shall give information thereof, setting out the reasons for the same, to the concerned applicant within thirty days.

(6) A foreign company registered pursuant to sub-section (4) may open its branch office and carry on the concerned business or transaction in or open its liaison office in the State of Nepal.

(7) Where the name of a foreign company making application pursuant to sub-section (2) or (3) or the object to be implement by such company is of such a nature that it cannot be registered pursuant to this Act. Such foreign company shall not be registered in Nepal.

(8) A foreign company registered pursuant to sub-section (4) shall be deemed to have been registered to carry on only the same type of business or transaction as is being carried on by it in the country where registered office is is situated or it has been incorporated.

(9) A foreign company registered pursuant to this Section shall put its name board in the place of its business in a manner conspicuous to all, and the name of country where the company has been established and the registration number of company registered in Nepal shall be clearly mentioned in such board and bills, receipt, invoices, etc. or letter pads to be used by the company.

(10) The Office shall maintain a separate register for the registration of foreign companies registered pursuant to this Section and make arrangements for the inspection of such register the general public and for getting a copy thereof by paying the prescribed fees.

(11) Notwithstanding anything contained elsewhere in this Act, a foreign company register pursuant to this Section shall not issue shares or debentures within the State of Nepal.

(12) Notwithstanding anything contained elsewhere in this Act, a foreign company which is carrying on a business or transaction or which is carrying on a business or transaction or which has established its liaison office in the State of Nepal without having been registered at the time of commencement of this Act shall get it registered with the Office pursuant to this Act no later than six months after the date of commencement of this Act.

In a nutshell, my expert advice to the Middletown management will be as follows.

a) A foreign company participating in the management of Nepalese company is not considered as operating business or doing transactions in Nepal and hence does not need to have a branch or a liaison office in Nepal.

b) In a case where Middletown Fabrics Ltd. wants to do business entering into work contract with a competent body in Nepal it needs to have a registered office here and for that purpose the said contract with the competent body is deemed to be the permission granted.

c) It is advisable to decide in advance what kind of business they want to do here in Nepal and then go for registering a branch/ liaison office. If not so decided have a registered office first as a foreign company then decide the business.

d) However a foreign company can do only the business or transactions in Nepal that has been carried out by it in the country where it is registered.
e) It shall submit all necessary documents as prescribed under Section 155 for the purpose of registration.
f) It shall submit a power of attorney from the country where it is originally registered appointing a person residing in Nepal as prescribed under Section 157.

Question No. 69:
Deemed participation in general meeting.

[Final/June, 2012](5 Marks)

Answer:
Deemed Participation in General Meeting
Section 150 of the Companies Act, 2063 says as follows:

1) Notwithstanding anything contained elsewhere in this Act, if, except, as otherwise provided in the articles of association of a private company, any shareholder of the company makes communication contact with all shareholders through any communication means and takes part in communication contact with other shareholders in such a manner that the other shareholders can hear or read whatever is spoken by every shareholder, every shareholder who so takes part in such communication contact shall be deemed to have taken part in the general meeting along with other shareholders.
2) Notwithstanding anything contained elsewhere in this Section, where any shareholder makes a complaint/petition accompanied by the prescribed fees, to the Office no later than three months after the holding of a general meeting, mentioning that he/she has not taken part in the general meeting, the Office shall inquire into the concerned company; and, in holding such inquiry, where the company fails to prove that the complainant shareholder has taken part in such meeting, the decision made by that meeting shall not be valid.
3) A meeting of shareholders conducted pursuant to Sub-section (1) shall be deemed to have been conducted in the place where the chairperson of the meeting is present.
4) The provisions of Sub-section (1), (2) or (3) applicable to the general meeting of a company shall also apply, mutatis mutandis, to the meeting of directors or a sub-committee of directors of the company.
5) After the completion of the general meeting pursuant to Sub-section (1), the chairperson of the meeting shall prepare minutes of the proceedings and decisions conducted and taken in the meeting annually and authenticate the same.

Question No. 70:

Answer the following questions:

(a) M/s KERICA Limited, incorporated on 1st Shrawan 2058 with an authorized capital of Rs. 1,00,00,000 divided into 1,00,000 shares @ Rs. 100 each. The company's performance during the last 5 years is as follows:-

F/Y 2058/59	Rs. 1,00,000	(Loss)
F/Y 2059/60	Rs. 10,00,000	(Profit)
F/Y 2060/61	Rs. 15,00,000	(Profit)
F/Y 2061/62	Rs. 1,50,000	(Loss)
F/Y 2062/63	Rs. 25,00,000	(Profit)

The company proposed to invite applications from the public for the purchase of its shares @ Rs. 60 per share including Rs. 10 as a premium. In this context, can KERICA Limited issue shares at a premium? Explain briefly citing the relevant provisions of the Company Ordinance, 2062 in this regard.

[December, 2006] (8 Marks) [Final/June, 2012] (5 Marks)

(b) Mr. Competent is the newly appointed Managing Director of M/S Impression Ltd. since last two months. Upon the review of the performance of Mr. Competent, the Board of Directors of the Company feels that he is the perfect man to drive the company in the future and hence wants to make the following decisions:

i. Appoint Mr. Competent as the Managing Director of the Company for the next five years.

ii. Provide Mr. Competent 5% of the net profit of the Company as performance incentive besides his regular remuneration packages.

Discuss the validity of the above decisions and advise the Board of Directors an appropriate way to execute the decisions if required.

[December, 2006] (6 Marks)

(c) Who is called a core/substantial shareholder? What are his obligations under the Company Ordinance, 2062?

[December, 2006] (6 Marks)

Answer (a):

According to Section 29 of the Companies Act 2063, a company may issue, with the prior approval of the office, shares at a premium under the following circumstances:

1) Any public company entitled to issue securities publicly pursuant to prevailing securities related law may issue shares at premium subject to term & conditions prescribed at such prevailing securities related law. However, any private company or a public company not making provision for issuing shares publicly may issue share at premium if assets exceed liabilities after taking approval of general meeting.

2) Where the shares are sold at a premium pursuant to Sub-section (1), a sum in excess of the face value, out of the proceeds thereof, shall be deposited in a premium account to be opened to that effect.
3) The company may use the moneys in the account as referred to in Sub-section (2) in the following acts:
   a) Paying up un-issued share capital to be issued to the shareholders as fully paid bonus shares,
   b) Providing for the premium payable on redemption of any redeemable preference shares,
   c) Writing off the preliminary expenses made by the company,
   d) Bearing or reimbursing the expenses of, or the commission paid or discount allowed on, any issue of shares of the company.
4) In making a request for approval of the Office to issue shares at a premium pursuant to Sub-section (1), the audited financial statements for three years shall be provided to the Office.

In the given situation, KERICA Limited, incorporated on 1st of Shrawan 2058, proposed to invite an application from the public for the purchase of its shares @ Rs. 60/share including Rs. 10 as a premium. However, afore stated premium relevant status of KERICA Limited has not been disclosed in the question. Hence, if the company satisfies afore stated criteria prescribed for public company, it can issue shares at premium.

Answer (b):

i) As per the Section 96 (4) of Companies Act 2063, Managing Director of a company cannot be appointed for more than four years at a time. However, his tenure can be renewed after the expiry of original agreement period. Hence, appointment of Mr. Competent as a Managing Director in M/S Impression Ltd. could not be done for next five years at a time. Otherwise, the appointment agreement shall be void ab intio to the extent of inconsistency to the Act. Assuming that the earlier tenure of Mr. Competent was also for four years, his current term will expire after next four years less previous two months; and hence his period could be renewed for remaining 14 months if the Board of Directors wants to retain him for the next five years.
ii) Section 91 of the Companies Act, 2063 provides that a company can provide up to 3% of net profit to full time directors in total as a performance incentive by passing special resolution in its General Meeting. Hence, the decision of Board of Directors of M/S Impression Ltd. to provide their MD 5% of net profit as performance incentive will be against the provision of the Act and should be reduced to 3%. Further the decision is required to be passed as special resolution of General Meeting of the Company.

Answer (c):

Section 50 of the Companies Act, 2063 prescribes about the substantial shareholder as follows:

1) If any person subscribes ordinary shares with full voting rights that are five percent or more of the paid up capital of any public company of which shares that person has held in his/her name or through his/her agent, that person shall be deemed to have his/her substantial shareholding in such company.
   Provided, however, that in the case of a company having the paid up capital of more than two hundred fifty million rupees, any person shall be deemed to have the substantial shareholding despite that such person has subscribed one percent or more of the total paid-up capital of such company.
2) A substantial shareholder of every public company shall give the company information setting out his/her name, address as well as full particulars of the shares registered in his/her or his/her agent's name, within thirty days after the knowledge of being a substantial shareholder of that company.
3) If a person ceases to be a substantial shareholder of any public company, that person shall give the company information setting out his/her name, date on which he ceases to possess the status of a substantial shareholder of that company & other particular as well as the reason why he/she has ceased to be a substantial shareholder, within thirty days after the date of knowledge of that matter.
4) Every public company shall maintain a separate register for the purposes of Sub- section (1), (2) and (3).

Question No. 71:

Mr. X Chairperson of Old Age Support House (Company not distributing profit) wishes to transfer whole of its assets to Women's Legal Aid an NGO. Mrs. Y, Chairperson, wife of Mr. Managing Director, was the chairperson of the Aid. The AOA of the house provided that upon the dissolution of the company, the general meeting shall have power to decide on the transfer of the remaining assets of the company. Mr. X, Chairperson, presented a resolution to amalgamate the House with the Aid. But the general meeting refused to amalgamate. Then Mr. X, Chairperson, proposed to liquidate the House and transfer the assets to the Aid. The general meeting of the house passed the proposal presented by Mr. X, Chairperson. Give your opinion whether resolution passed by the general meeting can be implemented according to the Companies Act, 2063

[December, 2011](5 Marks)

Answer:

This issue is related to the legal provision prescribed by the Companies Act, 2063 relating to Company Not Distributing Profit under Chapter 19.

Under Section167 (i), in the event of liquidation or cancellation of registration of a company (not distributing profits), the assets of the company, if any, remaining after the settlement of the debts and liabilities of the company shall be dealt with as per the provision, if any, contained in its articles of association, and failing such provision, such assets shall devolve on the government of Nepal. The provision clause also prescribes that however such assets shall in no way, devolve on

anybody or company where a promoter or member of such company or his close relative or close relative of such relative is a promoter or member.
So, in the given issue wishes of X, Chairman, to transfer the assets could be made as per the AOA of the house. Because it provided that upon the dissolution of the company, the general meeting shall have power to decide on the transfer of the remaining assets of the company, which is permissible under Section 167(i).

Question No. 72:
MD Clean Power Pvt. Ltd. was in process of incorporation. Promoters of the company signed an agreement for the purchase of certain equipment for the company and payment was to be made to the suppliers by the company after its incorporation. Shortly, after incorporation, the company went into liquidation and the debt for the purchase of assets could not be paid by the company. As a result, suppliers sued the promoters of the company for recovery of the dues. Examine, with reference to the provisions of the Companies Act, 2063 when the company can be held liable for payment in the given case.

[December, 2011](5 Marks)

Answer:
Section 17 of the Companies Act, 2063 prescribes about the incorporation contract as follows:
It is a case of pre-incorporation contract. A pre-incorporation contract is one which is made by a person on behalf of or purporting to be the company at a date prior to that on the company's certificate of incorporation.
Section 17(1) prescribes that a contract made prior to the incorporation of a company shall be a proposed contract only, and such contract shall not be binding on the company.
Section 17(2) makes persons liable for any contract related with transaction so carried on. However, Section 17(3) prescribes provision regarding the non-liability of a person for any such transaction if within the time mentioned in any transaction or within the reasonable time after incorporation of a company, the company through its act, action or conduct, accept any act, action or borrowing done or made prior to the date of authorization to commence its transaction or endorses such act or action that transaction shall be binding on the company and the other contracting party, and the person carrying out such act or action shall be released from the personal liability to be borne. So, in the given case, pursuant to Section 17(3) of the Act, the company can be made liable for the pre-incorporation contract, if the company after its incorporation accepts any act or action done prior to the date of incorporation and endorses such act that transaction shall be binding on the company.
Moreover, under Section 18(c) of the Act, the company may be made liable for transaction made by pre-incorporation contract by prescribing the provision in MOA and AOA i.e. if the company is to bear the expenses incurred in its incorporation that can be made valid by prescribing it in MOA.

Question No. 73:

Mr. Anil Gupta was appointed as an auditor by the AGM of the Pro-Power Company to audit its accounts of the Fiscal Year 2009-2010. The auditor committed certain offences in the course of auditing the accounts of the company. The company removed the auditor and complained this matter to Institute of Chartered Accountants of Nepal (ICAN). Pro-Power Company has sought your advice on the following questions:

a) What are the punishments imposed against the auditor for his offences under the Companies Act, 2063?
b) What action the Council of ICAN can take against the auditor, in this case?

[December, 2011](5+5=10 Marks)

Answer:

a) Punishments:
   (1) Section 160 of the Companies Act, 2063, has imposed the following punishment against the auditor who commits the following offense shall be punished by the Court with a fine from twenty thousand rupees to fifty thousand rupees or with imprisonment for a term not exceeding two years or with both:
      (a) where the auditor of the company states a false matter in his report in the course of carrying out his duty or omits necessary comments while making audit, with mala fide intention or malicious recklessness; or
      (b) an auditor who carries out auditing of the company even after he knows that he is not qualified to carry out auditing of any company (section 160(k) of the Act).
   (2) Pursuant to section 161 of the Companies Act, 2063 the auditor who does not present a report of audit shall be punished with a fine from ten thousand rupees to fifty thousand rupees.

b) The Council of ICAN can take disciplinary action against an auditor under sections 35 and 14 of Nepal Chartered Accountants Act, 2053. Pursuant to section 35 of this Act:
   (1) The Pro-Power Company may lodge a complaint to the ICAN against the auditor (holding certificate of practice) for not upholding the conduct mentioned in or for violation of this Act or Regulation framed under this Act.
   (2) The Executive Director shall, if he finds convincing information that proves any member or member holding certificate of practice is not observing the conduct, submit the proposal along with the related facts to the Council of the ICAN for further action against such member.
   (3) There shall be a Disciplinary Committee constituted by the ICAN Council under section 14 of the Act, to inquire into a complaint and recommend the Council for necessary action in cases where any one lodges a complaint in the Council that any member has done any act or action contrary to this Act or the Rules or code of conduct framed under this Act, or where the Council receives such information:

The Disciplinary Committee shall make recommendation, along with its opinion and finding, to the Council for taking necessary action against a member found guilty from its investigation; and the Council may, in view of such recommendation, impose any of the following penalties on the concerned member, according to the gravity of the offence:

(a) Reprimanding;

(b) Removing from the membership for a period not exceeding Five years;

(c) Prohibiting from carrying on the accountancy profession for any specific period;

(d) Cancellation of the certificate of practice or membership.

Under section 22 of the Act, there is a provision of removal of names and re-instatement of the membership. Accordingly;

(1) The Council may issue an order to remove the name of the auditor from the Membership Register for not abiding by the professional conduct referred to in this Act and the Rules framed under this Act.

(2) If his name has been removed from membership pursuant to sub-section (1) above makes an application, accompanied by a reasonable ground, to again obtain membership, the Council may decide to grant membership, by re-registering his or her name, upon receipt of the fees as prescribed.

Question No. 74:

Kiran Joshi Associates has been appointed auditor of Dena Bank Ltd. for the FY 2067/68 in the month of poush 2067. Recently in the month of Shrawan 2068 he has come to know that his brother in law, living separately and independently, has been holding 1.5 percent shares of Dena Bank Ltd. State the relevant provisions of the Companies Act, 2063 attracted by the development and the responsibility of auditors regarding information and disqualification?

[December, 2011](4 Marks)

Answer:

Clause (e) Section 112(1) of Companies Act, 2063 prescribes following person shall not be qualified for appointment as auditor and shall, despite appointment as auditor, not continue to hold office:

- A substantial shareholder of the company or a shareholder holding one percent or more of the paid up capital of the company or his/her close relative;

As per Section 112(2), the auditor shall, prior to his appointment, give information in writing to the company that he is not disqualified pursuant to sub-section (1).

As per Section 112(3), where any auditor becomes disqualified to audit the accounts of a company or there arises a situation where he becomes disqualified for appointment or can no longer continue to act as an auditor of the company, he shall immediately stop performing audit which is required to be performed or is being performed by him and give information thereof to the company in writing.

As per Section 112(4) The audit performed by an auditor who has been appointed in contravention of this Section shall be invalid.

Section - 2(z9) of the Companies Act, 2063:
"Close relative" means a partition member of an undivided family or husband, wife, father, mother, mother-in-law, father-in-law, elder brother, younger brother, elder sister, younger sister, sister-in-law (elder or younger brother's wife), brother-in-law, sister-in-law, brother-in-law (husband of elder sister), uncle, aunt, maternal uncle, maternal aunt, son, daughter, daughter-in-law, grand-son, grand-daughter, grand-daughter-in-law or son-in-law.

In the given case, considering the provisions of Section 112(1)(e) read together with Section 2(z9), the appointment and continuity of the Auditor is invalid and has to be resigned immediately by notifying the company.

Question No. 75:
Audit Committee
[December, 2011](5 Marks) [December, 2009](5 Marks) [June, 2011](5 Marks)
Answer:
Section 164 of the Companies Act, 2063 prescribes provisions regarding Audit Committee. According to it a listed company with paid up capital of thirty million rupees or more or a company which fully or partly owned by the Government of Nepal has to form an audit committee under the chairpersonship of a director who is not involved in day to day operation of the company and consisting of at least three members. The Act also prescribes the disqualification of the member of the committee. In other words a person who is a close relative of the chief executive of a company should not be appointed as a member of the committee. Similarly, the Act prescribes the provision that at least one member of the audit committee should be an experienced person having obtained professional certificate on accounting or a person having gained experience in accounting and finance with bachelor degree in commerce or economics.
It is the board of directors to arrange all means and resources as may be adequate for the fulfillment of responsibilities of the audit committee. Audit may fix its internal rules of procedures on its own. Section 165 prescribes the functions, duties and powers of audit committee. Major functions, duties and powers of the committee may be noted as follows:

a) To review the accounts and financial statements of the company and ascertain the truth of the facts mentioned in such statements;
b) To review the internal financial control system and the risk management system of the company;
c) To supervise and review the internal auditing activity or the company;
d) To recommend the names of potential auditors for the appointment of the auditor of the company, fix the remuneration and terms and conditions of appointment of the auditor and present the same in the general meeting for the ratification thereof;

e) To review and supervise as to whether the auditor of the company has observed such conduct, standards and directives determined by the competent body pursuant to the prevailing law as required to be observed in the course of doing auditing work;
f) Based on the conduct, standard and directives determined by the competent body pursuant to the prevailing law, to formulate the polices required to be observed by the company in respect of the appointment and selection of the auditor;
g) To prepare the accounts related policy of the company and enforce, or cause to be enforced, the same;
h) Where any regulatory body has provided for the long term audit report to be set out in the audit report of the company, to comply with the terms required to prepare such report;
i) To perform such other terms as prescribed by the board of directors in respect of the accounts, financial management and audit of the company.

Question No. 76:

Answer the following questions:

a) Robeus Zeestar Ltd. is incorporated in 2011. After handling certain project it suffered loss. As the company is in loss the employees of the company including creditors are demanding for the payment of the sum and debt loan payable to the employees and creditors respectively.
The board approached you for your advice regarding the liquidation of the company. In this context answer the following questions:
    i) Explain the procedure of liquidation of the company.
    ii) What are the rights of the liquidator?
    iii) State the priorities fixed by the existing law while settling liabilities after dissolution.

b) Kantipur Power Ltd., a debt free listed company, having a fully paid up Equity Share Capital of Rs. 25 billion, Cash and Bank Balance of Rs. 10 billion, Free Reserves of Rs. 15 billion and Net Profit for FY 2066/67 of Rs. 5 billion, wants to improve the profitability of the company through reduction of Share Capital by Rs. 5 billion. Advise the company regarding the option available for reduction of Share Capital and the circumstances in which it may buy back its' shares as per the provisions of Companies Act, 2063.

[Final/December, 2011](15+5=20 Marks)

Answer:

a) i) Liquidation Procedures:
A company may be liquidated in two ways either voluntary or compulsorily. Section 126 of the Companies Act, 2063 has described the voluntary liquidation whereas insolvency act 2006 has specifically describes the compulsory liquidation of the company. In voluntary liquidation, the following procedures are followed:

- The company is able to pay its debts and the shareholders of the company may liquidate the company either by adopting a special resolution in the general meeting or memorandum of association, articles of association or consensus agreement.
- A company may be liquidated if the company is able to pay its debts or other liabilities in full;
- If there exists no situation where an application for the review of insolvency of the company is pending under the prevailing law on insolvency or where the company would be in any manner subject to an insolvency proceeding under the prevailing law on insolvency;
- If the directors of the company, have, after due inquiry, made a declaration in writing that the company is able to pay its debts and other liabilities in full and that the debts and liabilities to be paid on behalf of such company can be paid up or can be fully settled in any other process within one year from the date of the adoption of the resolution to liquidate the company;
- If the written declaration made by the directors pursuant to Clause (c) was presented in the general meeting called to discuss the matter of liquidation of the company or such declaration was made at the time of discussions on that matter in the general meeting.
- A copy of the special resolution adopted with respect to the liquidation of a company pursuant to this Section and a written declaration of directors shall be submitted to the Office in later than seven days after the date of adoption of the resolution.

In case of the company is liquidated compulsorily, the insolvency act, 2006 be attracted and following procedures are followed:

The procedures of liquidation of a company start when the court issues an order to terminate the company, on the ground of application or reorganization manger that the reorganization program failures.

According to S.37 of Insolvency Act 2006 liquidation of the company begins on the issuance of order of Court to the appointment of liquidator. The court makes an order to appoint one person as a liquidator, from among the persons who are capable (as per law) to carry on the insolvency business at the time of making such order.

Following the court order to appoint a liquidator for the purpose of liquidation, the liquidation proceedings of the company is deemed to have commenced.

Section 38 of the Insolvency Act 2006 prescribes provision regarding consequences on the commencement of liquidation proceedings. According to it on the commencement of the liquidation proceedings, the following provisions govern the following matters in relation to such company:

a. Where the director and office of the company are relieve of office, all the powers of the company in relation to the management vest on the liquidator.

b. The liquidator takes in his control and custody all the assets, accounts and books of accounts of the company, except the properties in possession of secured creditor.
c. Except otherwise ordered by the liquidator, the services of all the employees appointed by the company will terminate.
d. Except for the following matters, the provision relation to 'ipso facto' suspension set forth in section of the Insolvency Act , applies during the period of liquidation proceedings:
   i. Implementation of right of the secured creditors to execute pursuant to the Act.
   ii. Implementation of the right of lesser of any property leased to the company to redeem the property pursuant to the Act.
   iii. Section 131 of the Companies Act, 2063 has given certain power to the liquidator as follows:
   - The liquidator appointed under this Act shall, mutatis mutandis, exercise and perform all the powers and duties which may be exercised and performed by a liquidator under the prevailing law on insolvency.
   - It shall be the duty of the liquidator to do the following acts, without prejudice to the generality of Sub-section (1):
     - To prepare and submit to the office, the statements and accounts of incomes and expenditures in the course of liquidation in every six months after the appointment of the liquidator;
     - To inform the shareholders of the company about the progress on the liquidation proceedings in every six months after the appointment of the liquidator;
     - To obtain and recover all properties or amounts required to be obtained and recovered on behalf of the company and repay and discharge the debts and other liabilities of all the creditors of the company;
     - Following the completion of the act as referred to in Clause (c) , to call the general meeting of shareholders and present therein a proposed report and return on the distribution of the remaining properties of the company to the shareholders;
     - If the shareholders holding at least seventy five per cent of the paid up share capital consent to the return as referred to in Clause (d), to make payment of amounts to the shareholders accordingly;
     - At the completion of liquidation proceedings, to prepare a report on the properties recovered, payments made to the creditors and distributions made to the shareholders, on behalf of the company, and submit such report, certifying that the company has been liquated, accompanied by the auditor's report, to the Office.

   Section 40 of the Insolvency Act, 2006 has also provided power to the liquidator appointed under this act.

iii) Priorities in settlement of liabilities after liquidation:

As per the provisions of the Insolvency Act, 2006, Section 57, the liabilities of the liquidated company should be settled and paid in the following order of priority by the liquidator:

a. For all the expenditure made including remuneration of the interim administrator appointed by the court in connection with S.11 (4) of the Insolvency Act 2006.
b. Expenditure made to fulfill all the liabilities incurred in the course of insolvency proceedings at the court in case of insolvency process.
c. To bear all the expenses incurred by the investigation officer appointed including his remuneration for the purpose of investigation in respect of insolvency proceedings.
d. Expenses incurred by the reorganization manager or liquidator appointed including his remuneration for the purpose of reorganization of a company in respect of reorganization proceedings.
e. To repay all the loan obtained by a company in the course of investigation proceedings in respect of insolvency.
f. To repay all the loan obtained by a company in the course of reorganization proceedings.
g. Expenses incurred by a liquidator appointed in liquidating the company including his remuneration.
h. Salaries and wages, payment for leave, gratuity, provident fund (where applicable) and other amounts payable to the employees and workers at the time of issuing of order of liquidation or reorganization.
i. All other debts claimed as approved by liquidator.

The Act also prescribes to treat all liabilities as per the priorities and all of them required to be fulfilled in equal basis. Where there is not enough amounts to fulfill all liabilities it is to be fulfilled in their ratio basis.

j. If after settling all the liabilities of the company in priority as stated above, the residue if any has to pay first the interest for the loan obtained in the course of insolvency or reorganization and then will be distributed amongst the preferential shareholders and then amongst the equity shareholders in proportionate to the shares held by them.
k. Under Section 58 of the Act the Liquidator can settle the liabilities of creditors at a time or by part basis.

b) Reduction of share capital as provided in Section 57 of the Companies Act, 2063 are as follows:

i) If a company intends to reduce its' share capital, it may, by adopting a special resolution to that effect at its' general meeting, reduce its share capital by obtaining approval of the Court and making necessary amendment to or alteration in the memorandum of association and articles of association, accordingly.

ii) On receipt of approval of the Court pursuant to sub-section (1), the company may reduce its' share capital as follows:
   a. By reducing the capital to such amount as has been paid up where calls for payment of amount on shares are not fully paid up,
   b. By paying back any paid-up share capital
   c. By devaluation the face value of shares where the company has sustained a big loss or suffered a natural calamity.

iii) Notwithstanding anything contained in sub-section (2), a company that has already become insolvent in accordance with the prevailing law shall not reduce its' capital pursuant to this Section.

Looking at the conditions of the company given in the questions Kantipur Power Ltd. may opt the option provided under section (2) (b).

Circumstance in which buy back is possible as provided in Section 61(2) of the Companies Act, 2063, are as follows:

61(2) notwithstanding anything contained in subsection (1), in the following **circumstances,** a company may buy back its' shares out of its' free reserves available for being distributed as dividends, by giving information to the office:

a) Where the shares issued by the company are fully paid up;
b) Where the shares issued by a public company have been listed in the Securities Board;
c) Where the buy back of shares is authorized by the articles of association of the concerned company;
d) Where a special resolution has been adopted at the general meeting of the concerned company authorizing the buyback;
e) Where the ratio of the debt owed by the company is not more than twice the capital and general reserve fund after such buy-back of shares;
   Explanation: For the purposes of this clause, "debt" means all amounts of secured or unsecured debts borrowed by the company.
f) Where the value of shares to be bought back by a company is not more than twenty percent of the total paid up capital and general reserve fund of that company;
g) Where the buy-back of shares is not in contravention of the directives issued by the office in this respect.

Since the company fulfills the conditions required by 61(2) (a), (b), (e), (f), and (g), it can buy back shares passing special resolution as required by 61 (2) (d) and article of the company contains the provision allowing to do so as required by the provision 61 (2) (c).

Question No. 77:

The share capital of Mr. Biru Praja in Kapilas Commercial Bank (not listed) was as follows:

Share Capital of Kapilas Dev. Bank	Portion of Mr. Biru Praja	Date
Rs. 200 Million	Rs. 10.5 Million	till 2067.10.25
Rs. 255 Million	Rs. 10.5 Million	after 2067.10.25

Explain referring Companies Act, 2063 regarding the status of Mr. Biru Praja before/after Magh 25, 2067.

[Final/December, 2011](5 Marks)

Answer:

The problem attracts the meaning of substantial shareholders. As per section 50 of the Companies Act, 2063, following are the provisions as to substantial shareholders:

50 (1) : If any person subscribes ordinary shares with full voting rights that are five percent or more of the paid up capital of any public company of which shares that person has held in his/ her name or through his/her agent, that person shall be deemed to have his/her substantial shareholding in such company.

Provided, however, that in the case of a company having the paid up capital of more than two hundred fifty million rupees any person shall be deemed to have the substantial shareholding despite that such person has subscribed one percent or more of the total paid-up capital of such company.

50 (2) : A substantial shareholder of every public company shall give the company information setting out his/her name, address as well as full particulars of the shares registered in his/ her or his /her agent's name, within thirty days after the knowledge of being a substantial shareholder of that company.

50 (3): If a person ceases to be a substantial shareholder of any public company, that person shall give the company information setting out his/her name, the date on which he ceases to possess the status of a substantial shareholder of that company and other particulars as well as the reason why he/she has ceased to be a substantial shareholder, within thirty days after the date of knowledge to that matter.

50 (4): Every public company shall maintain s separate register for the purposes of Sub- sections (1), (2) and (3)

In a given case, before Magh 25, 2067, Birju Praja had owned Rs 10.5 million shares out of Rs 250 million paid up capital of the company which is about 5.25%. Hence, as per section 50(1) of Companies Act 2063, he is a substantial shareholder of that company. After the date, the entire paid up capital increased to Rs 255 million. Then, the % of share owned by him decreased to 4.11%. However, being the paid up capital of the company more than Rs 250 million, his shareholding is still 1% or more required to be a substantial shareholder of the company. Hence, there is no change in the status of Birju Praja before and after Magh 25, 2067. He continues to remain a substantial shareholder of the company despite of decrease in his shareholding %.

Question No. 78:

Indigo Ltd. passed an ordinary resolution at the meeting of the shareholders to issue shares at a discount to a commercial bank. The objective of the issue is to convert the loan borrowed by the company from the commercial bank to equity share. State the provisions regarding prohibition to issue shares at a discount as specified in the Companies Act, 2063?

[December, 2011](5 Marks) [June, 2011](5 Marks)

Answer:

Section 64 of Companies Act, 2063 prescribes about the issue of shares at discount as follows:

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

(2) Notwithstanding anything contained in subsection (1), a company may, for the following purpose, 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) For issuing or selling shares pursuant to a capital restructuring scheme of the company;

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

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

(d) For issuing shares on such other conditions/purposes as approved by the Office.

Considering the above mentioned provisions it is expedient that the company has to pass a special resolution to legitimise the issue of shares.

Question No. 79:

Answer the following questions:

M/S Chialsa Power Limited was registered as public Company (not listed) on 2061/4/1 to generate 480 KW electricity in Chialsa, Solu with a paid up capital of Rs. 40,00,000. (45% owned by Electricity Company Ltd. and 45% by foreign diplomatic mission)

Paid up capital of the Company in the previous years were as follows:

Financial years	Paid Up Share Capital (Rs)
2061/62	40,00,000
2062/63	80,00,000
2063/64 onwards	5,00,00,000

a) Increase in the paid up capital in both the years was not duly informed to the Office of the Registrar of Company. What is the consequence?

b) The company has submitted all documents including the audited financial statements to the Registrar of Company on 2067/6/25 first time since the inception. State the penalties as applicable to the directors or officers who are in default in providing the return, notice, information or reply as per the Company Act, 2063.

c) If the Company is not distributing profit will your opinion be different?

[Final/June, 2011](5+12+3=20 Marks)

Answer:

a) Same type of question was asked in December, 2012 for 8 marks.
Further, following consequences will be applicable U/S 81 of the Companies Act 2063 in the given case:

i. The director or officer of the company shall be liable to pay penalty as per the provision under section 81(2). The director or the officer who are in default in providing the return, notice, information or reply shall pay Rs. 10,000.00 during the F/Y 2062/63 as the paid up capital were Rs. 8 millions, Rs. 20,000.00 each year from the financial year 2063/64 as the paid up capital of the company is more than ten millions.

ii. The Company Act, 2063 permits to increase the paid up capital if it is within the limit of the issued capital and the Articles of the Company permits. In the given case, the company can increase the paid up capital, however, they have not submitted the inventory of the paid up capital of the company to the Registrar's Office within 30 days after the date at which the annual general meeting of the company is held as per section 51 of the Company Act, 2063. They are in default and penalties as per section 81 are applicable to them.

b) As per sub- section (1) of section 81 of the Compaany Act, 2063, any return, notice or information required to be provided by the company to this office or information to be provided by the officer or shareholder to the company pursuant to this Act, shall be provided by the director of the company or the office or shareholder who has the duty to provide such return, notice or information to the office or the company, as the case may be, within the time limit, if any, prescribed by this Act for the provision of such return, notice or information.
Under sub-section (2) director of a company or its officer who is in default in providing the return, notice, information or replay as referred to in section 51, 78, 120, 131, or 156 within the time limit as referred to in sub-section (1) shall be punished by the Registrar with fine, as follows:

(a) A fine of one thousand rupees if the paid up capital of the company is up to two million five hundred thousand rupees, a fine of two thousand rupees if the paid up capital of the capital is up to ten million rupees, and a fine of five thousand rupees if the paid up capital of the company is more than ten million rupees, for a period not exceeding three months after the expiry of the time limit;

(b) A fine of one thousand five hundred rupees if the paid up capital of the company is up to two million five hundred rupees, a fine of three rupees if the paid up capital of the capital is up to ten million rupees, and a fine of seven thousand rupees if the paid up capital of the company is more than ten million rupees, for and additional period not exceeding three months after the expiry of the time limit as referred to in Clause (a);

(c) A fine of two thousand five hundred rupees if the paid up capital of the company is up to two million five hundred thousand rupees, a fine of five thousand rupees if the paid up capital is up to ten million rupees, and a fine of ten thousand rupees if the paid up capital

of the company is more than ten million rupees, for an additional period not exceeding six months after the expiry of the time limit as referred to in Clause (b);

(d) A fine of five thousand rupees, for each year, if the paid up capital of the company is up to two million five hundred thousand rupees, a fine of ten thousand rupees, for each year, if the paid up capital is up to ten million rupees, and a fine of twenty thousand rupees, for each year, if the paid up capital of the company is more than ten million rupees, in cases where even the time limit as referred to in Clause (c) has also expired.

In the case of a company not distributing profits which is in default in providing such statement, information or notice within the time limit as referred to in Sub-section (1), the director or officer of such company shall be liable to the same fine as is imposable on a company of which paid up capital is up to ten million rupees.

Any director, officer or shareholder who is liable to pay the fine as referred to in Sub-section (2) shall pay it to the Office and submit to the Office or the concerned company such returns as required to be forwarded.

In calculating the period of expiration of the time limit pursuant to Sub-section (2), it shall be calculated from the date of commencement of this Act.

Any director, officer or shareholder of a company who is in default in providing such other statement, notice or information as is required to be forwarded to the Office pursuant to this Act shall be punished with a fine of two hundred rupees for every month, after the expiration of one month of the date of expiry of the time limit within which such statement, notice or information is required to be provided.

Provided that such fine amount shall not be more than Rupees one thousand in one fiscal year.

c) If the company is not distributing profit the penalty imposable for not submitting information, reports etc. will be calculated as per the provision of section 81(3) under which all the companies not distributing profit are considered as the companies having up to ten million capital for the purpose of calculation of such penalties. Hence, Chialsa Power Limited's responsible officer will have to pay Rs. 10,000 for each year of default since the fiscal year 2062/63, even it is assumed as non-distributing profit company.

Question No. 80:

Answer the following questions:

The Board of Directors of Progressive Co. Ltd. Kathmandu, Nepal engaged in land and building, purchase and sales made the following decisions:

a) To provide donations of Rs. 10,00,000/- to a charitable society of the remote district of Humla. (Assume that the Company has unabsorbed accumulated loss)

b) To take long term loan Rs. 10,00,00,000/- from a commercial Bank for the promotion of business extension. (Assume Rs.2,00,00,000 as paid up capital and free reserve)

Do you think that the above decisions are justifiable to the Company? Evaluate referring the provisions of Companies Act, 2063/

[Final/June, 2011](5 Marks)

Answer:

Section 105 of the Companies Act 2063 B.S. provides as follows:

i. **In respect of the donations:**
   Excepting the cases of business promotion or the employees welfare, no company can spend by way of donation Rs. 1,00,000 or 1 % of the average net profit of the last three years, whichever is lower.

ii. **In respect of long term loans:**
   No company is authorized to receive long term loans in excess of the sum of the paid-up capital and the free reserves without the approval of the general meeting in the form of a special resolution.
   Based on the legal provision as stated above, no board of directors can make those decisions, without the prior approval of general meeting through a special resolution.In a given case, the Paid up capital & free reserve is Rs. 2 crore. The decision as decided by board isnot valid and the decision is null & void.

Question No. 81:

Records of Company and use of Computer.

[Final/June, 2011](5 Marks)

Answer:

Records of company and use of computer: It is provided under section 172 of the Companies Act, 2006 in the following words:-

1) The records of any minute book, shareholders or debenture holders register, index of shareholders, books of account, accounts etc. required to be maintained by a company pursuant to this Act may be maintained either by making entries thereof in separate books or by recording the same by any electronic communication device and computer in a non-legible form or in any other manner, without prejudice to the provisions contained in this section.
2) In case where the records of any minute books, shareholders or debenture holders register, index of shareholder, books of account, accounts etc. have not been maintained by making entries thereof in a record book but maintained in any other manner, the following provisions shall be applicable.
   b) If it is easily accessible to the place where the records of such minute book, shareholders or debentures register, index of shareholders, books of account, accounts, etc. are maintained and where such records can be inspected or copes thereof can be obtained, such records shall be deemed to have been maintained in any specific place.
   c) The company shall make adequate arrangements that no one can destroy or alter the records as referred to in Clause (a) and that the matters recorded therein can be easily traced and inspected and copies thereof can be obtained.

d) Where any matter has been so recorded that it is not legible, the matter shall be capable of being reproduced in a legible form.

3) Where the records of any minute book, shareholders or debenture-holders register, index of shareholders, books of account, accounts etc. are put in an web site by using any electronic communication device or computer pursuant to this section, arrangements shall be made so that the date of such preparation of documents as well as the date of amendment thereto can be easily seen.

4) Where a company has maintained the records of any minute book , register, index , books of account, accounts etc. maintained pursuant to this Act in a non-legible form and any law establishes the obligation of the company to allow such records for inspection or to submit copies thereof , then it shall be the obligation of the company to make such arrangements that the relevant portions of such records can be inspected and that copies thereof can be submitted in a visible or legible form.

Question No. 82:

Protection of interest of the shareholders.

[Final/June, 2011](5 Marks)

Answer:

Protection of the interest of the shareholders.

The following are the provisions of the Companies Act 2063 for the protection of the interest of the shareholders

a) The shareholders can lodge a complaint in a court of law against any director /official of the company if they try to exceed their authority (section 138)

b) Any shareholder can go to a court of law if his or her right of interest is adversely affected by the company's activities (section 139)

c) A shareholder with 2.5% paid up capital or some shareholders with 5% of the paid of capital can start legal proceedings in a court of law on behalf of the company if the company doesn't do it's activities on its own as per the law and the regulations

Question No. 83:

Mr. Anil Gupta was appointed as an auditor by the AGM of the Pro-Power Company to audit its accounts of the Fiscal Year 2009-2010. The auditor committed certain offences in the course of auditing the accounts of the company. The company removed the auditor and complained this matter to Institute of Chartered Accountants of Nepal (ICAN). Pro-Power Company has sought your advice on the following questions:

a) What are the punishments imposed against the auditor for his offences under the Companies Act, 2063? 5

b) What action the Council of ICAN can take against the auditor, in this case? 5

[June, 2011](5+5=10 Marks)

Answer:

a) Section 160 of the Companies Act, 2063, has imposed the following punishment against the auditor who commits the following offense shall be punished by the Court with a fine from twenty thousand rupees to fifty thousand rupees or with imprisonment for a term not exceeding two years or with both:
   (a) where the auditor of the company states a false matter in his report in the course of carrying out his duty or omits necessary comments while making audit, with mala fide intention or malicious recklessness; or
   (b) an auditor who carries out auditing of the company even after he knows that he is not qualified to carry out auditing of any company (section 160(k) of the Act).
   (2) pursuant to section 161 of the Companies Act, 2063 the auditor who does not present a report of audit shall be punished with a fine from ten thousand rupees to fifty thousand rupees.

b) The Council of ICAN can take disciplinary action against an auditor under sections 35 and 14 of Nepal Chartered Accountants Act, 2053. Pursuant to section 35 of this Act:
   (1) The Pro-Power Company may lodge a complaint to the ICAN against the auditor (holding certificate of practice) for not upholding the conduct mentioned in or for violation of this Act or Regulation framed under this Act.
   (2) The Executive Director shall, if he finds convincing information that proves any member or member holding certificate of practice is not observing the conduct, submit the proposal along with the related facts to the Council of the ICAN for further action against such member.

   There shall be a Disciplinary Committee constituted by the ICAN Council under section 14 of the Act, to inquire into a complaint and recommend the Council for necessary action in cases where any one lodges a complaint in the Council that any member has done any act or action contrary to this Act or the Rules or code of conduct framed under this Act, or where the Council receives such information.

   The Disciplinary Committee shall make recommendation, along with its opinion and finding, to the Council for taking necessary action against a member found guilty from its investigation; and the Council may, in view of such recommendation, impose any of the following penalties on the concerned member, according to the gravity of the offence:
   (a) Reprimanding;
   (b) Removing from the membership for a period not exceeding Five years;
   (c) Prohibiting from carrying on the accountancy profession for any specific period;
   (d) Cancellation of the certificate of practice or membership.

   Under section 22 of the Act, there is a provision of removal of names and re-instatement of the membership. Accordingly;
   (1) The Council may issue an order to remove the name of the auditor from the Membership Register for not abiding by the professional conduct referred to in this Act and the Rules framed under this Act.

(2) If his name has been removed from membership pursuant to sub-section (1) above makes an application, accompanied by a reasonable ground, to again obtain membership, the Council may decide to grant membership, by re-registering his or her name, upon receipt of the fees as prescribed.

Question No. 84:

ADJ Company Limited was amalgamated with the merged in XYZ Company Limited. Some workers of ADJ Company Limited refuse to join as workers of XYZ Co. and claim compensation for premature termination of service. XYZ Co. resists the claim on the ground that their services are transferred to XYZ Co. limited by order of amalgamation and merger and, therefore, the workers must join service of XYZ Co. and cannot claim any compensation. Examine whether the workers contention is correct.

[June, 2004](5 Marks) [June, 2011](5 Marks)

Answer:

After receiving an approval for amalgamation under sub-section 5 of section 177 of Companies Act, 2063, all the property and liabilities of the company to be merged shall be deemed to have devolved on the company that has been amalgamated. Property and liabilities of one company to another does not automatically transfer contracts of personal services, which are in their nature, incapable of being transferred and no contract of service is thereby created between an employee of the transferor company on the one hand and transferee company on the other. Therefore, contention of workers is justified.

Question No. 85:

Directors' Responsibility for the Loss of Net Worth of a Company.

[June, 2011](5 Marks)

Answer:

Under section 60 of the Companies Act 2006, if the net worth of a public company is reduced half the paid up capital or less, the directors shall prepare a suitable strategy or plan in the interest of the company and shareholders within 30 days of the knowledge of the fact and present an appropriate resolution at the general meeting to be held at the earliest. However, where an approval of the general meeting is required to implement such a strategy an extra-ordinary general meeting shall be called. The directors of the company who fail to prepare a strategy or to present a resolution at the general meeting or who knowingly permit the existence of the situation where such a meeting is not called, shall be liable to punishment. If it is held that net worth of a company has been reduced as mentioned as a result of a malafide intention of any director, such a director shall be liable to pay compensation.

Question No. 86:

Chhewang Kusum was appointed as an auditor by the Annual General Meeting of Sagarmatha Company Limited to audit its accounts of the fiscal year 2008-2009. The Auditor committed certain offences in the course of auditing the accounts of this company. Sagarmatha Company Ltd. has sought your advice on the following questions:

b) What action can this company take against the Auditor for committing offences?
c) What are the punishments imposed against the Auditor for his offences under the Companies Act, 2063?
d) Can Council of ICAN also take any action in this case against the Auditor, who is also a member of ICAN? If yes, what action can be taken?
e) Which court of law shall hear a case against the offending Auditor?

(December, 2010)(10 Marks)

Answer:

a) Pursuant to section 119 of the Companies Act, 2006, Sagarmatha Ltd. Company can take the following action against the Auditor Chhewang Kusum:
If the auditor breached the code of conduct of auditors or did any act against the interest of the company which has appointed him as the auditor or committed any act contrary to the prevailing law, such auditor may be removed through the same process whereby he/she was appointed as auditor, by giving prior information to the Nepal Chartered Accountants Institute, and with the approval of the regulatory authority, if any authorized by the prevailing law for the regulation of business of the company concerned , and failing such authority, with the approval of the Company Registrar's Office.
While removing the auditor as above, the auditor shall be provided with a reasonable opportunity to defend himself.

b) Section 160 of the Companies Act, 2006, has imposed the following punishment against the Auditor who commits the following offense shall be punished with a fine from twenty thousand rupees to fifty thousand rupees or with imprisonment for a term not exceeding two years or with both punishments:
(1) Where the Auditor of a company states a false matter in his report in the course of carrying out his duty or omits necessary comments while making audit, with mala fide intention or malicious recklessness, such auditor (section 160 (c) of the above Act);
(2) An Auditor who carries out auditing of the concerned company even after he knows that he is not qualified to carry out auditing of any company (section 160(k) of the above Act).
(3) The Auditor who commits the following offense shall be punished with a fine from ten thousand rupees to fifty thousand rupees (section 161 of the Companies Act, 2006): the Auditor who does not present a report as specified in the Act (section 161(d)).

c) Yes, ICAN can take disciplinary action against an Auditor under sections 35 and 14 of Nepal Chartered Accountants Act, 1997. Pursuant to section 35 of this Act:

1) The concerned person may lodge complaint to the ICAN against any member or member holding Certificate of Practice for not upholding the conduct mentioned in or for violation of this Act or Regulations framed under this Act.
2) The Executive Director of the ICAN shall, if he finds convincing information that proves any member or member holding Certificate of Practice is not observing the conduct, submit the proposal along with the related facts to the Council for further action against such member.

There shall be a Disciplinary Committee constituted by the ICAN Council under section 14 of the Act, to inquire into a complaint and recommend the Council for necessary action in cases where anyone lodges a complaint in the Council that any member has done any act or action contrary to this Act or the Rules or Code of Conduct framed under this Act, or where the Council receives such information

The Disciplinary Committee shall make recommendation, along with its opinion and finding, to the Council for taking necessary action against a member found guilty from its investigation; and the Council may, in view of such recommendation, impose any of the following penalties on the concerned member, according to the gravity of the offence:

(a) Reprimanding;
(b) Removing from the membership for a period not exceeding Five years;
(c) Prohibiting from carrying on the accountancy profession for any specific period;
(d) Cancellation of the Certificate of practice or membership.

Under section 22 of this Act, there is Provision of Removal of Names and Re-instatement of the membership. Accordingly:

(1) The Council may issue an order to remove the name of any member from the Membership Register on any of the following circumstances:
   (a) If he is convicted by a court of a criminal offence involving moral turpitude and punished therefore,
   (b) If he fails to pay any fees required to be paid to the ICAN;
   (c) If he fails to abide by the professional conduct referred to in this Act and the Rules framed under this Act;
   (d) If he becomes unsound-minded; or
   (e) If he is dead.

(2) If a person whose name has been removed from membership pursuant to Sub-section (1) makes an application, accompanied by a reasonable ground, to again obtain membership, the Council may decide to grant membership, by re-registering his or her name, upon receipt of the fees as prescribed.

d) Pursuant to clause z8 under section 2 of the Companies Act, 2006, "Court" means the commercial bench of a court specified by the Government of Nepal by a notification in the Nepal Gazette, with the consent of the Supreme Court.

Except in cases where jurisdiction is expressly given to the Company Registrar's Office on any matter under this Act, the Commercial Bench of the particular High Court as recently constituted by the Government on the advice of the Supreme Court shall have power to hear and settle the cases on offenses punishable under this Act, the mattes on which a complaint or application can be made to the Commercial Bench as mentioned in various Sections of this Act and matters of compensation for amounts in controversy.

In hearing and settling cases under this Act, the Commercial Bench of the Court as above shall follow the procedures as referred to in the Summary Procedures Act, 2028.

An appeal against any decision or order made or issued by the Company Registrar's Office may be made to the Commercial Bench, within thirty-five days.

Question No. 87:

Share Qualification of Directors.

[June, 2007](5 Marks) [December, 2010](5 Marks) [June, 2005](5 Marks)

Answer:

A person, in order to qualify, as a director of any company, shall hold such number of shares in his name as has been prescribed in the articles of association of the company. In case, no minimum shares have been prescribed in the articles of association of the company, at least 100 shares shall be subscribed under Section 88 of Companies Act, 2063. However, professional director/s appointed under Section 86 (3) and director or alternate director nominated by a body corporate under Section 87 (2) shall not require the qualification shares.

Question No. 88:

Global Careful Ltd., a listed Company accidentally omitted to serve notice of General Meeting to one shareholder while some shareholders did not receive the notice sent at their addresses. Mr. A, holding 10 shares of Rs. 100 each, to whom the notice was not served, sought an injunction that the resolutions passed at the General Meeting not be given effect to on the ground that notices were not properly served by the Company. Do you think Mr. A would be successful in obtaining an injunction order?

[December, 2008](5 Marks) [December, 2010](8 Marks)

Answer:

Sec 67(10) of Companies Act, 2063: Generally, all public companies should send general meeting notice to every shareholder at least 21 days in advance for annual general meeting and of 15 days in advance for special general meeting. Such notice should be sent to the address of shareholders as made available by them to the company. Additionally, the notice shall be published at national daily newspaper at least two times as well. Nonetheless, the proceeding at any general meeting shall not be void or invalid merely for reason of accidental omission to serve notice to any shareholder of any listed company or for the non-receipt, by any shareholder of the notice sent at

the address which he has supplied to the company. Hence, Mr. A would not succeed in obtaining an injunction order in the given circumstances.

Question No. 89:

Answer the following questions:

a) Nepal Telecom Ltd., a debt free listed company, having a fully paid up equity share capital of Rs. 15 billion, Cash and Bank Balance of Rs. 20 billion, Free Reserves of Rs. 20 billion and Net Profit for FY 2065/66 of Rs. 7billion, wants to improve the profitability of the company through reduction of Share Capital by Rs. 5 billion. Advise the company regarding the option available for reduction of Capital and the circumstances in which it may buy back its' shares as per the provisions of the Companies Act, 2063?

b) M/S D S & Co, Chartered Accountants, sole proprietorship of Mr. Dhiraj Sharma has been appointed auditors of Alpha Company Ltd. for the FY 2065-66. The audit was commenced in the month of Baisakh 2066, however halfway through Mr. Dhiraj Sharma comes to know that his father in law has come to acquire 4.5 percent shares of Alpha Company Ltd. Analyse the impact and responsibilities, if any, in the light of the Companies Act, 2063?

c) Mrs. Januka is appointed as director from the Annual General Meeting of M/S Pinky Flour Mills Ltd. on 2066/10/15 for 4 years. However, she has not submitted any disclosure to the company where she has been appointed as director under Section 92 of the Companies Act, 2063.

In this situation, who, either company or the director is responsible for the default? What should be the possible punishment to the accused?

d) Under the Articles of Association of a company, the directors of a company had power to borrow up to Rs. 5,00,000 without the consent of the general meeting. The directors themselves lent Rs. 10,00,000 to the company without such consent and took debentures.

Is the company liable for Rs. 10,00,000? If not, for what amount, if any, is the company liable?

[June, 2010](5+5+5+5=20 Marks)

Answer:

a) Reduction of share capital as provided in Section 57 of the Companies Act 2063 are as follows:

(a) If a company intends to reduce its' share capital, it may, by adopting a special resolution to that effect at its' general meeting, reduce its share capital by obtaining approval of the Court and making necessary amendment to or alteration in the memorandum of association and articles of association, accordingly.

(b) On receipt of approval of the Court pursuant to sub-section (1), the company may reduce its' share capital as follows:

(a) By reducing the capital to such amount as has been paid up where calls for payment of amount on shares are not fully paid up,

(b) By paying back any paid-up share capital,

(c) By devaluating the face value of shares where the company has sustained a big loss or suffered a natural calamity.

(c) Notwithstanding anything contained in subsection (2), a company that has already become insolvent in accordance with the prevailing law shall not reduce its' capital pursuant to this Section.

Circumstances in which buy back is possible as provided in Section 61(2) of the Companies Act 2063, are as follows:

(1) No company shall purchase its own shares (buy-back) or lend money against security of its own shares.

(2) Notwithstanding anything contained in Sub-section (1), in the following circumstances, a company may buy back its shares out of its free reserves available for being distributed as dividends, by giving information to the Office:

(a) Where the shares issued by the company are fully paid up;

(b) Where the shares issued by a public company have been registered in the Securities Board;

(c) Where the buy-back of shares is authorized by the articles of association of the concerned company;

(d) Where a special resolution has been adopted at the general meeting of the concerned company authorizing the buyback;

(e) Where the ratio of the debt owed by the company is not more than twice the capital and general reserve fund after buy-back of shares;
Explanation: For the purposes of this Clause, "debt" means all amounts of secured or unsecured debts borrowed by a company.

(f) where the value of shares to be bought back by a company is not more than twenty percent of the total paid up capital and general reserve fund of that company;

(g) Where the buy-back of shares is not in contravention of the directives issued by the Office in this respect.

b) The issue is related to provisions of Section 112(1)(e), 112(3), 112(4) and 2(z9) of the Companies Act 2063 which has been explained below. M/s D.S & Co. has to immediately stop performing the audit and report to the company in writing. Any audit performed in contravention of Section 112 of the Companies Act 2063 shall be invalid.

Section 112 - Disqualifications of auditor:

Section 112(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:

Section 112(1)(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;

Section 112(3): Where any auditor becomes disqualified to audit the accounts of a company or there arises a situation where he becomes disqualified for appointment or can no longer continue to act as an auditor of the company, he shall immediately stop performing audit which is required to be performed or is being performed by him and give information thereof to the company in writing.

Section 112(4): The audit performed by an auditor who has been appointed in contravention of this Section shall be invalid.

Definition of a Close Relative as per Section 2(z9) - "Close relative" means a partition member of an undivided family or husband, wife, father, mother, mother-in-law, father-in-law, elder brother, younger brother, elder sister, younger sister, sister-in-law (elder or younger brother's wife), brother-in-law, sister-in-law, brother-in-law (husband of elder sister), uncle, aunt, maternal uncle, maternal aunt, son, daughter, daughter-in-law, grand-son, grand-daughter, grand-daughter-in-law or son-in-law.

c) The first duty to disclose the matter goes to director. He has to disclose all matters as mentioned in section 92 of Companies Act, 2063 as follows:

(1) A director shall, no later than fifteen days after assuming the office of director, disclose in writing to the company the following matters:

(a) If he/she or his/her close relative has direct involvement or any kind of personal interest in any kind of sale and purchase or other kind of contract related with the transactions of the company;

Explanation: For the purposes of this Clause, "direct involvement" means and includes a situation where the director or his/her close relative is a promoter of or holds more than ten per cent shares of a company or private firm or partnership firm or a director of a company involved in such transaction.

(b) If he/she has any kind of interest in the appointment of the managing director, company secretary, officer of the company;

(c) If he/she is a director of any other company;

(d) If he/she has made any dealing in the shares or debentures of the company or of its holding or subsidiary company, about matters of such dealing.

(2) In making disclosure pursuant to Sub-section(1), a copy of the written agreement, if any, concluded between the company and the director or his/she close relative shall be submitted, and failing such agreement, substantial and necessary matters concerning the transaction or interest or involvement shall be set out.

(3) The company shall submit to the Office the information as referred to in Sub-section (1) within seven days of the receipt of such information; and upon receipt of such information, the Office shall record the same in a separate register maintained for this purpose.

(4) If any director has an interest directly or indirectly linked to any kind of contract, lease, transaction or agreement entered or to be entered with the concerned company or its subsidiary company or comes to his/her knowledge that such interest will be so linked, that

director shall disclose that matter to the company promptly, setting out the extent and kind of such interest.

(5) If any director gives written information to the company that he be considered to have his/her personal interest in a transaction with any certain person, that director shall be deemed to have disclosed his/her personal interest in any transaction or contract to be done or made with such person.

Section 160 (j) will be attracted in this case. The Company Registrar Office will impose punishment with fine not exceeding fifty thousand rupees or with imprisonment for a term not exceeding two year or with both where the director who has the duty to give any information to the company, office, court or other body pursuant to this Act fails to give such statement of information, such director or officer are in default and hence liable for punishment.

d) The facts of this problem are based on the case of Howard vs. Patent Ivory Manufacturing Co (1888). It was held that the directors had knowledge of the irregularity and hence company could not be held liable for anything more than the amount allowed to be borrowed under the Articles. Thus, in this case company can be held liable only for Rs. 5,00,000. The protection of the rule of indoor management cannot be claimed by one who has the knowledge of the indoor happenings. So directors could not defend the issue which they were lending money to the company required the assent of the general meeting they had not obtained.

Question No. 90:

The Board of Directors of a company have filed a complaint with the Institute of Chartered Accountants of Nepal against their statutory auditors for them failing to attend the Annual General Meeting of the Shareholders in which audited accounts were considered.

Examine, what is the validity of such complain?

[June, 2010](5 Marks)

Answer:

The Companies Act 2063 makes it compulsory for every company to appoint qualified auditor to do the audit of the accounts maintained by the company. Once an auditor is appointed by a company his prime duty is to conduct audit business. In the course of fulfilling his duty he has a right to demand to be furnished the books of accounts and records of the company. An auditor of a company has right of free and complete access at all times to the books, accounts, and vouchers of the company whether kept at the head office or elsewhere. He has also the right to require from the officers of the company or concerned director of the company such information and explanation as may be necessary for the performance of his duties as auditor. Similarly he is entitled to receive notice of and to attend general meetings of the company and be heard on any part of the business that concerns him as auditor.

As an obligation of auditor he is to make a report to the member of the company on the accounts examined by him and on every balance sheet and every profit and loss account laid before the company in general meeting during his tenure of office. Such report can be submitted with "qualified report" as the case may be.

The Companies Act has made it obligatory on companies to maintain books of accounts. It also prescribes that at every annual general meeting, the board of directors must present, before the company, a balance sheet and profit and loss account and in the case of non-profit companies and income and expenditure account should be submitted. The balance sheet and profit and loss account must be signed on behalf of the board by two directors and countersigned by manager or secretary. If the company has a managing director, he should be one of the signed on behalf of the signing directors. The balance sheet and profit and loss account must be approved by the board before they are submitted to the auditors who must, in turn, attach their own report thereto. The report of the board should describe the company's state of affairs, the amount proposed to carry to reserves, the amount recommended for dividend and also any change that occurred during the financial year in regard to the nature of the business of the company. The report should also explain adverse remark of the auditor, if any.

While submitting report it should furnish director's responsibility statement.

As per the given issue whether it is an obligation of an auditor to be present in the general meeting compulsorily. According to the legal provision it shows that it is not an obligation of an auditor to be present in the general meeting, personally. His prime duty is to prepare audit report and to make a report to the members of the company on the accounts examined by him and to present before the company general meeting. He may attend general meeting with a view to make clear where it is necessary. It is the duty of the board of directors to deal the matters regarding the report including financial report. It is the responsibility of board of directors who must lay the company a balance sheet and profit and loss account before every general meeting and defend them. The balance sheet and profit and loss account must be signed on behalf of the board by two directors and countersigned by manager or secretary. The balance sheet and profit and loss account must be approved by the board before they are submitted to the auditors who must, in turn, attach their own report thereto. Board of directors is the final authority to approve the balance sheet of the company. Those approve the documents they will be responsible for that. So, the ultimate responsibility regarding the financial report goes to the board of directors although the report is being prepared with reference to the audit report. In such case the auditor's role will be just to facilitate in the financial report business although he is entitled to dig out matters and activities regarding it. In the course of disseminating the information regarding the financial position of the company he can make to call extra-ordinary general meeting where it is necessary. So, it is not mandatory duty of an auditor to be present in general meeting. It is a part of the moral duty of the auditor to be present in the general meeting. However he is entitled to get the information regarding general meeting of the company to be held. So, whatever the complaint made by board of directors does not carry validity.

Question No. 91 :

AB Mining Ltd. is a public company, was established on 2063/12/28 and had started its commercial production on 2064/1/12. In the mean time, the Board of Directors of the company had appointed statutory auditor for the year 2063/64 to conduct the audit of the company. However, the company could not hold its first annual general meeting till the end of Ashadh 2066. The Board of Directors of the company again appointed the same auditor saying that the company had not yet conducted the first annual general meeting for the year 2064/65 and 2065/66.

Explain, referring the provisions of the Companies Act, 2063, legality of the appointment of the auditor.

[June, 2010](5 Marks)

Answer:

Under Section 111 of the Companies Act, 2063 following are the provisions for the appointment of auditor:

(a) The auditor of a company shall be appointed, from amongst the auditor licensed to carry out audit under the prevailing law, by the general meeting, subject to chapter – 18, in the case of a public company, and, in accordance with the provision as contained in the memorandum of association, articles of association or consensus agreement, any failure in such provision, by the general meeting, in the case of a private company; and his name shall be forwarded to the office within fifteen days from the date of such appointment.

Provided, however, that the board of directors may appoint the auditor prior to the holding of the first annual general meeting.

(b) The auditor appointed pursuant to sub-section (1) shall hold office until the next annual general meeting.

(c) No auditor or his partner or ex-partner or employee or ex-employee shall be appointed an auditor for more than three consecutive terms to perform the audit of a public company.

Under Section 113 the power is provided to the Office of Company Registrar under certain circumstances as follows:

Where the annual general meeting of a company fails to appoint an auditor for any reason or where the annual general meeting itself cannot be held or where the auditor appointed pursuant to this Act ceases to continue his office for any reason, the office may, at the request of the board of directors of the company, appoint another auditor.

In a given case, the first auditor as appointed by the board of directors is valid, however so far as the second year and third years auditor appointed by the board of directors is not valid. Though due to certain reasons, the company could not conduct first annual general meeting in time, it does mean that the board of directors has authority to appoint the auditor for years till the annual general meeting of the company is held.

Question No. 92:

Memorandum of Association

[June, 2010](5 Marks)

Answer:

The memorandum of association of a company is in fact its charter; it defines its constitution and the scope of the powers with which it has been established under the Act. It is the very foundation on which the whole edifice of the company is built.

Section 18 of Companies Act, 2063 prescribes about the provision of memorandum of association as follows:

(1) The Memorandum of Association of a company shall state the following matters:
   (a) The name of company,
   (b) The address of the registered office of the company,
   (c) The objectives of the company,
   (d) The acts to be carried out to accomplish the objectives of the company,
   (e) The figure of the authorized capital of the company and the figure of the share capital to be issued by the company for time being and the figure of undertaken to be paid by the promoter of the company,
   (f) Types of shares of company, rights & powers inherent in such shares, value of each share & number of shares of different types,
   (g) Restrictions, if any, in the purchase or transfer of shares,
   (h) Number of shares which the promoters have undertaken to subscribe for the time being,
   (i) Terms of payments of share amounts,
   (j) Statements that the liability of shareholders shall be limited,
   (k) The maximum number of shareholders in case of a private company,
   (l) Other necessary matters.

(2) If any of the following matters shall be done or provided, in addition to those mentioned in Sub-section(1), the memorandum of association shall also state such matters:
   (a) If the promoter or any other person is entitled to subscribe shares or acquire title thereto in any manner other than by making payment in cash, such matter,
   (b) If the company is to acquire any property in any manner from the promoter or any other person at the time of commencement of its transactions such matter,
   (c) If the company itself to bear the expenses incurred on its incorporation, such matter,
   (d) If the promoter or any other person is entitled to any special privilege or right from the company, such matter.

(3) In subscribing shares or acquiring title thereto by the promoter or any other person in consideration of other than cash payment as mentioned in Clause (a) of Sub- section (2) & in acquiring any property by the company from the promoter or any other person at the time of commencement of its transactions as mentioned in cause (b), in the case of a public company, such consideration other than cash and such property shall be caused to be evaluated by an engineer or accountant holding certificate to conduct valuation work under the prevailing law.

(4) The criteria for the valuation of any property pursuant to Sub-section (3) shall be as prescribed; and unless such criteria are prescribed, the person valuating such property shall mention the criteria employed by him/her to valuate the property.

(5) If the memorandum of association is inconsistent with this Act it shall ipso facto be void to the extent of such inconsistency.
(6) The format of memorandum of association shall be as prescribed.

Question No. 93:
Compare and contrast between bonus share and payment of bonus.

[Final/June, 2010](5 Marks)

Answer:
Bonus share:
If the articles so authorize, a company has the power to convert its accumulated undivided profits into bonus shares. Directors may capitalize any profits and allot to the ordinary shares in respect of the net amount capitalized fully paid-up shares of the company. The amount may also be used in paying up any amounts for the time being unpaid on any shares.
Issue of bonus shares is machinery for capitalizing profits. Where a company used its development rebate fund for issuing bonus shares, there was no disbursement of money and the company remained entitled to development rebate. Bonus share has been described as a distribution of capitalized undivided profit. In the case of issue of bonus share there is an increase in the capital of the company by transferring of an amount from its reserve to the capital account and thereby resulting in additional shares being issued to the shareholders. However the general principle behind bonus share is that it cannot be issued as a gift. Pursuant to section 83 of Companies Act 2063, a special resolution is to be passed at general meeting of the company for issue of bonus share to equity shareholders.

In addition, section 179 of the Companies Act, 2006 prescribes and explain regarding bonus shares as follows:
(1) A company may, by adopting a special resolution in the general meeting, issue bonus shares to its shareholders, out of the amount available for the distribution as dividend.
(2) Where a company is to issue bonus shares pursuant to sub-section (1) above, the company shall give information thereof to the Company Registrar's Office before issuing such shares.

Payment of Bonus:
The Bonus Act, 1974 aims to provide for the legal provisions for distribution of bonus to the workers and the personnel working in the Enterprise.
According to section 5 of the Bonus Act, 2030, bonus has to be distributed by the profit making enterprise in the following manner:
1) Each profit making enterprise shall have to allocate an amount equivalent to Ten percent of its net income of one fiscal year for bonus to the employees.

2) While assessing the net income of any enterprise derived in any one fiscal year pursuant to sub-section (1) above, the following amounts shall have to be deducted from the net income assessed pursuant to Income Tax Act, 2058:-
   (b) The bonus amount distributed excessively under section 11(3).
3) Notwithstanding anything contained in sub-section (1) above, the percentage of bonus and other matter relating to bonus which is to be distributed by the Government-owned enterprises shall be as determined by the Government of Nepal.

Eligibility for Bonus has been determined under section 6 of the Bonus Act, 1974 as follows:-

(1) An employee who has worked for a half of a period to be worked in a fiscal year shall be entitled to obtain bonus under Bonus Act.
Provided that, no employee shall be entitled to obtain Bonus who has worked casually or in a shift basis.

(2) For the purpose of sub-section (1) above, the following periods shall also be computed as a period where an employee has worked:
(a) A period kept on reserve under any contract or under Section 11 of the Labour Act, 1991.
(b) A period under which an employee is on any leave with pay of any category.
(c) A period of disablement caused by accident arising in course of business of the enterprise.

Question No. 94:

Answer the following questions

Balance Sheet of ABC Company limited, a public limited (not listed) as at 31.3.2066 is given below:

Share holders' Fund & Liabilities	Amount (Rs.)
Share Capital – Paid UP	5,00,00,000
Reserve and Surplus	1,00,00,000
Current Liabilities	9,00,000
Provisions	20,00,000
Total	6,29,00,000
Application of Funds	
Fixed Assets – Net	3,09,00,000
Capital work in Progress	10,00,000
Investment	2,00,00,000
Inventory	30,00,000
Trade Receivables	20,00,000
Cash and Bank Balances	60,00,000
Total	6,29,00,000

Paid up capital of the company in the previous years were as follows:

Financial year	Paid Up Share Capital (Rs.
2060/61	50,00,000
2061/62	70,00,000
2062/63 onwards	5,00,00,000

a) The company has submitted all documents including the audited financial statements to the Registrar of company on 2066/6/25 first time since the inception. States the penalties as applicable to the directors or officers who are in default in providing the return, notice, information or reply as per Company Act, 2063.

b) During the period, the paid up capital of the company had increased by Rs. 20,00,000 in 2061/62 and Rs. 4,30,00,000 in 2062/63. Do you think the company is legally correct to increase paid up capital without informing Office of the Company Registrar?

[December, 2009](15 Marks)

Answer:

b) As per Sub – Section (1) of Section 81, any return, notice or information required to be provided by the company to this Office or information required to be provided by the officer or shareholder to the company pursuant to this Act shall provided by the director of the company or the officer or shareholder who has the duty to provide such return, notice or information to the Office or the company, as the case may be, within the time limit, if any, prescribed by this Act for the provision of such return, notice or information.

Under Sub – Section (2) director of a company or its officer who is in default in providing the return, notice, information or reply as referred to in sections 51, 78, 120, 131 or 156 within the time limit as referred to in sub-section (1) shall be punished by the Registrar with fine, as follows:

(a) A fine of one thousand rupees if the paid up capital of the company is upto two million five hundred thousand rupees, and fine of two thousand rupees if the paid up capital is upto ten million rupees, and a fine of five thousand rupees if the paid up capital of the company is more than ten million rupees, for a period not exceeding three months after the expiry of the time limit.

(b) A fine of one thousand five hundred rupees if the paid up capital of the company is upto two million five hundred thousand rupees, a fine of three thousand rupees if the paid up capital of the capital is upto ten million rupees, and a fine of seven thousand rupees if the paid up capital of the company is more than ten million rupees, for an additional period not exceeding three months after the expiry of the limit as referred to in clause (a);

(c) A fine of two thousand five hundred rupees if the paid up capital of the company is upto two million five hundred thousand rupees, a fine of five thousand rupees if the paid up

capital of the capital is upto ten million rupees and a fine of ten thousand if the paid capital of the company is more than ten million rupees, for an additional period not exceeding six months after the expiry of the time limit as referred to the clause (b);

(d) A fine of five thousand rupees, for each year, if the paid up capital of the company is upto two million five hundred thousand rupees, a fine of ten thousand rupees, for each year, if the paid up capital of the capital is upto ten million rupees, and a fine of twenty thousand rupees, for each year, if the paid up capital of the company is more than ten million rupees, in cases where even the time limit as referred to in clause (c) has also expired.

As per sub-section (3), in the case of a company not distributing profits which is in default in providing such statement, information or notice within the time limit as referred to in Sub-section (1), the director or officer of such company shall be liable to the same fine as is imposable on a company of which paid up capital is up to ten million rupees.

As per sub-section (4), any director, office or shareholder who is liable to pay the fine as referred to in Sub-section (2) shall pay it to the Office and submit to the Office or the concerned company such returns as required to be forwarded.

As per sub-section (5), in calculating the period of expiration of the time limit pursuant to Sub-section (2), it shall be calculated from the date of commencement of this Act.

As per sub-section (6), any director, officer or shareholder of a company who is in default in providing such other statement, notice or information as is required to be forwarded to the Office pursuant to this Act shall be punished with a fine of two hundred rupees for every month, after the expiration of one month of the date of expiry of the time limit within which such statement, notice or information is required to be provided.

Provided that such fine amount shall not be more than Rupees one thousand in one fiscal year.

In a given case the directors or the officers who is in default in providing the return, notice, information or reply shall pay Rs. 10,000/- during the F/Y 2061/62 as the paid up capital were Rs. 7 millions, Rs. 20,000/- each year from the financial year 2062/63 as the paid up capital of the company is more than ten millions.

c) Section 53 of the Company Act 2063 permits to increase the paid up capital if it is within the limit of the issued capital and the Articles of the Company permits. In a given case, the company can increased the paid up capital, however, they had not submitted the inventory of the paid up capital of the company to the Registrar Office within 30 days after the date at which the annual general meeting of the company is held as per the Section 51 of the Company Act 2063. They are in default and penalties as per section 81 are applicable to them.

Question No. 95 :

Galaxy Trading Ltd's main objective is trading on various consumer and industrial goods. The Board of Directors of the company wants to diversify its business and wants to venture in to remittance business. Since this new line of business is not in its objective, it has proposed in annual

general meeting the special resolution to amend the objectives. The agenda got approved by the meeting, however some of the shareholders voted against the proposal.
What are the basic characteristics of the 'corporate personality'? Mention.

[June, 2009](5 Marks)

Answer:
Following are the basic characteristics of the corporate personality:

- Independent corporate existence
- Legal person
- Limited liability
- Separate property
- Perpetual succession
- Transferable of the shares
- Capacity to sue and being sue
- Professional management

Question No. 96:
What do you mean by doctrine of 'Corporate Veil'? Explain.

[June, 2009](5 Marks)

Answer:
Piercing/lifting/removing the corporate veil describes a legal decision to treat the rights or duties of a company as the rights or liabilities of its shareholders or directors.A company, formed and registered under the Companies Act, possesses a separate legal personality solely responsible for the debts it incurs and the sole beneficiary of the credit it is owed. The law usually upholds this principle of separate personhood, but in exceptional situations may "pierce" or "lift" the corporate veil. A simple example would be where there is a fraud committed by the director in the name of the company, the director himself may be made liable for the crime. This is called "Lifting of the Corporate Veil".

Question No. 97:
X-Press Co. Ltd. was established in 2053 B.S. with an authorized capital of Rs. 1,00,00,000 divided into 1,00,000 shares of Rs. 100/- each. Out of the total paid up capital, 80% is held by general public and 20% by local promoters. The company issued 28,000 shares of Rs. 100 each to the general public in 2055 B.S. which was over subscribed. The dividend pay off for three years is as follows:

Fiscal Year	Rate of dividend
2060/61	40%
2061/62	20%

2062/63 20%

The summary of adjusted Balance Sheet as of 32 Ashadh 2063 of the company is as under:

32.3.2062	Capital and Liabilities	32.3.2063	32.3.2062	Assets	32.3.2063
1,00,00,000	Authorized Capital	1,00,00,000			
50,00,000	Issued Capital	50,00,000	15,00,000	Cash & Bank Balance	5,00,000
35,00,000	Issued & paid up Capital	35,00,000	20,00,000	Investments	50,00,000
10,00,000	Accumulated Profit	2,00,000	5,00,000	Fixed Assets	10,00,000
20,00,000	Creditors & short term loans	56,00,000	25,00,000	Other Assets/Receivable	28,00,000
65,00,000	**TOTAL**	93,00,000	65,00,000	**TOTAL**	93,00,000

The above Balance Sheet was approved by the shareholders in their Annual General Meeting held on 15 Mangsir 2063 together with the following other resolutions:

(i) Declaration of dividends @ 20% to the shareholders (Board of Directors had recommended 10% dividends).

(ii) Issue 28,000 shares of Rs. 100/- each at a premium of Rs. 100/- per share (As recommended by the Board of Directors).

Examine the validity of the resolutions passed by the shareholders assuming that no other appropriations, except dividends, were done in FY 2062/63.

[December, 2007](3+5=8 Marks) [June, 2009](20 Marks)

Answer:

i. As per the requirement of Section 77(6) of the Companies Act, 2063 matter relating to declaration and distribution of dividend to shareholders has to be approved by the shareholders. However, the shareholders cannot approve a rate of dividend which is higher than the rates recommended by the Board of Directors. In the given case, shareholders have declared 20% dividend which is 10% more than the dividend recommended by the Board of Directors. Hence, the decision made by the shareholders in its AGM is not legally valid.

ii. The following matters have to be examined:
The existing authorized capital of the company is Rs. 1 crore, issued capital is Rs. 50 Lacs and paid up capital is Rs. 35 Lacs. The effect of the shareholders' resolution is to.

a) Increase the company's paid up capital ;
b) Issue shares at a premium

As far as the increase of issued share capital is concerned, after issue of the proposed 28,000 unit shares, the issued capital of the company will increase to Rs.63,00,000 which is within the present authorized capital. To increase issued capital to the extent of the authorized capital of

a company, an ordinary resolution of the shareholders is enough as per Sec. 56(5) of the Companies Act 2063.

In the case of issue of shares at a premium, the following aspects prescribed under section 29 of the Companies Act, 2063 have to be examined first:
Any public company entitled to issue securities publicly pursuant to prevailing securities related law may issue shares at premium subject to term & conditions prescribed at such prevailing securities related law. However, any private company or a public company not making provision for issuing shares publicly may issue share at premium if assets exceed liabilities after taking approval of general meeting.

(1) Where the shares are sold at a premium pursuant to Sub-section (1), a sum in excess of the face value, out of the proceeds thereof, shall be deposited in a premium account to be opened to that effect.

(2) The company may use the moneys in the account as referred to in Sub-section (2) in the following acts:
   (a) Paying up un-issued share capital to be issued to the shareholders as fully paid bonus shares,
   Providing for the premium payable on redemption of any redeemable preference shares,
   (b) Writing off the preliminary expenses made by the company,
   (c) Bearing or reimbursing the expenses of, or the commission paid or discount allowed on, any issue of shares of the company.

(3) In making a request for approval of the Office to issue shares at a premium pursuant to Sub-section (1), the audited financial statements for three years shall be provided to the Office.

In the given case, assuming X-Press Co. Ltd., a public company not entitled to issue securities publicly under prevailing securities law, has assets more than liability. Hence, the general meeting of the company has adopted a resolution to issue shares at a premium which meets requirement (iii) above.

Question No. 98:
List out the matters the adoption of which requires a special resolution in the general meeting of the company?

[December, 2007](5 Marks) [June, 2009](5 Marks)

Answer:
Section 83 of the Companies Act, 2063 lists the matters which have to be presented in the form of special resolution for decision of the general meeting. The subject matters are as under:

a) To increase authorized capital of a company.
b) To reduce or alter share capital of a company.

c) To change the name or main objective of a company.
d) To merge one company with another company.
e) To issue bonus shares.
f) To purchase own shares.
g) To convert a public company into a private company or to convert a private company into a public company.
h) Any other matter requiring special resolution under the companies act or article of association of a company.

Question No. 99:
Write short note on Sweat Equity.

(December, 2008) (5 Marks)

Answer:
Sweat equity refers to a contribution made by people to a company in a form of time and effort. It can be contrasted with financial equity which is the money paid for equity. It may be said that the sweat equity is a form of compensation by businesses to their owners or employees.
Companies Act, 2063 has also adopted the concept of issuing sweat equity. Section 18(2) (a) requires a company to mention in its memorandum of association whether a promoter or any other person would be entitled to get shares for considerations other than cash. For public companies, equity for other than cash can be issued for a value of such consideration as assessed by a certified engineer or a chartered accountant. Section 64 also allows a company to issue shares to its employees at discount which is also a form of sweat equity.

Question No. 100:
Answer the following questions:

a) A group of like-minded businessman planned to incorporate a construction company by the name of Bhagwan Construction Ltd. However, before the Company was incorporated, they jointly won a big government tender which was undertaken immediately. For this assignment, a bank loan of Rs 50 million was taken by them on the condition that the loan would be repaid by their future company, Bhagwan Construction Ltd. after its incorporation. However, when the Bank claimed payment from the Company on the due date, the Company refused to do so contending that it did not avail the loan.
Is the contention of the Company correct? Examine in the light of the Companies Act, 2063.
b) Mr. Ramu Chaudhary is the professional director of ABC Bank Ltd. He is proposed by another upcoming "A" class licensed Institution to hold the position of director. Since he is only a professional director, with no shareholding in the first Bank, Mr. Chaudhary assumes that he is eligible to take up the position of director in the new Bank. Do you agree with his decision?

[December, 2008](6+6=12 Marks)

Answer:

a) Same type of question was asked in December, 2011 as well for 5 marks.
b) Section 18(1)(e) of the Bank and Financial Institution Acts 2073 provides that the incumbent director or an employee of any corporate body carrying out transactions of bank or financial institution or any institution collecting any type of deposits or carrying out transactions relating to insurance is disqualified to become a director of another bank or financial institution.

In the given case, Ramu Chaudhary is a professional director of ABC Bank Limited. Even though he has not invested in the bank, he still is a director and this prohibitory clause is applicable to him too. Hence, he is disqualified from holding the position of director in another commercial bank by virtue of the above sub-section of the Act until he occupies the post of director.

Question No. 101 :

The Board of Directors of Preeti Spinning Ltd felt that changed conditions were not favourable to the company's long term prospects and thus decided that the company be liquidated voluntarily.

(i) What are the conditions for the company to voluntarily liquidate?
(ii) What is the procedure for voluntary liquidation of the company?
(iii)What would be the consequences if it is discovered, during the process of liquidation, that the company is not able to pay its liabilities in full?

(December 2008)(10 Marks)

Answer:

i. When shareholder of the company intend to close and deregister the company, it may do so, which is called voluntary liquidation of the company. Since one of the pre-condition for this kind of liquidation is that the company should be solvent, it is also called liquidation of a solvent company.

Section 126 (2) of the Companies Act, 2063 has prescribed the conditions on which a company may go for voluntary liquidation. These are as follows:

1. The company is able to pay its debts or other liabilities in full,
2. There exists no situation where an application for the review of insolvency of the company is pending under the prevailing law on insolvency or where the company would be in any manner subject to an insolvency proceeding under the prevailing law on insolvency;
3. The directors of the company, have after due inquiry, made a declaration in writing that the company is able to pay its debts and other liabilities in full and that the debts and liabilities to be paid up or can be fully settled in any other process within one year from the date of the adoption of the resolution to liquidate the company;

4. Written declaration made by the directors pursuant to the clause (c) was presented in the general meeting called to discuss the matter of liquidation of the company or such declaration was made at the time of discussion on that matter in the general meeting.

ii. Following are the processes that should be completed while liquidating the company voluntarily:
   (b) Passing special resolution in the general meeting of the shareholders,
   (c) Appointment of liquidator and auditor,
   (d) Realizing the proceeds from the assets and paying the liabilities by the liquidators,
   (e) Cancellation of registration of the company.

iii. If it is discovered, during the process of liquidation of the company, that the company is insolvent and consequently the company cannot pay its loan or meet its liabilities, then the liquidation process shall stop and action will have to be initiated as per the provisions of Insolvency Act. Also, the directors who declared the company as solvent will be penalized for such wrong declaration and may be punished with fine between 10 to 50 thousand rupees. The director who is thus punished shall remain disqualified to become a director in any other country for a period of six months.

Question No. 102 :

For a meeting to take place in a private limited Company, all the participants need not sit in one place. Examine this statement in light of the provisions of Companies Act, 2063.

[December, 2008](5 Marks)

Answer:

Chapter 14 of the Company Act has provided various special provisions applicable for a Private Company. In this regard section 150 provides the conditions on which a meeting shall be valid even if all participants are not physically present at one place. As per Section 150 (1) if the memorandum and articles of the company does not provide for otherwise a shareholder of a private company may contact, by any means of communication with all other shareholders so that each shareholder participating in the communication can hear or read what is said or communicated by each of the others. Each shareholder so participating is deemed to be present at a general meeting with the other shareholders so participating.

Section 150 (4) further provides that the above provision is applicable even for the meetings of board of directors or sub-committee of directors.

A meeting so conducted shall be deemed to be held in the place in which the chairperson of the meeting is present.

Therefore a private limited company can conduct a meeting with available means of communication without all shareholders or directors present at one place of the meeting. But it must have the proof of participation by all the shareholders or directors. In case a shareholder or

director lodges a complaint that he has not attended the meeting within 3 months and if the company cannot prove his participation, decision taken at such meeting will be void.

Question No. 103 :

Explain the following with reference to the provisions of the Companies Act, 2063:

a) Quorum for General Meeting of a Company. 8
b) Matters to be presented in the form of Special Resolution in the General Meeting 7

[June 2008](8+7=15 Marks)

Answer

a) The quorum for a general meeting of a company is stipulated as under, as per section 73 of the Companies Act, 2063:

Private Company: Quorum for a general meeting of a private company shall be as per the provisions made in the Articles of Association of the company.

Public Limited Company: In case of a public limited company, quorum for a general meeting has been fixed in terms of share representation as well as number of shareholders present in person or by proxy. Accordingly, except otherwise stipulated in their Articles of Association for a larger number, no general meeting shall be conducted unless more than 50% of the total number of shares allotted are represented and a minimum of 3 shareholders are present either in person or by proxy (Section 73 ,sub-section 2). In case, a general meeting could not be held due to want of quorum as per sub-section 2, another meeting may be convened by giving a minimum of 7 day's notice. In such re-convened meeting, representation of a minimum of 25% of total number of shares allotted and a minimum of 3 shareholders out of the total shareholders present either in person or by proxy shall be deemed sufficient to meet the quorum (Section 73, sub-section 3).

However, the presence of a minimum of 3 shareholders will not be compulsory for a public company which is promoted by another public company or a public company which is incorporated by the government by converting a public corporation/development board into a company- sub-sec.(4).

b) Section 83 of the Companies Act, 2063 lists the matters which have to be presented in the form of a special resolution for decision of the general meeting. The subject matters are as under:

ii) to increase authorized capital of a company.
iii) to reduce or alter share capital of a company.
iv) to change the name or main objective of a company.
v) to merge one company with another company.
vi) to issue bonus shares.
vii) to purchase own shares.
viii) to convert a public company into a private company or to convert a private company into a public company.

ix) any other matter requiring special resolution under the Companies Act or under the Article of Association of a Company.

Question No. 104:

What do you understand by special business transacted in the AGM of a Company?

[June, 2008](4 Marks)

Answer:

In case of an AGM the items of business other than i) the consideration of Accounts and Directors' and Auditor's Report ii) declaration of dividends iii) appointing of directors in place of those retiring and iv) appointment of and fixation of remuneration of auditors, which are considered as ordinary business, are deemed as special business.

The notice convening the meeting at which special business will be transacted should state the nature of the special business. Otherwise such business cannot be transacted in the meeting.

Question No. 105:

Answer the following questions

b) Balance sheet of XYZ Company Limited as at 31.03.2063 is given below.

Capital & Liabilities	Amount Rs.	Assets	Amount Rs.
Authorized Capital	5,00,00,000	Cash & Bank Balance	50,00,000
Issued and Paid up capital	1,00,00,000	Investment	10,00,000
		Fixed Assets	50,00,000
General Reserve	40,00,000	Inventory	1,10,00,000
Accumulated Profit	50,00,000	Sundry Debtors	1,00,00,000
Sundry Creditors	1,30,00,000		
Total	3,20,00,000	Total	3,20,00,000

In the last three years the Company earned net profits as below:

FY 2060/61 50 lakhs

FY 2061/62 55 lakhs

FY 2062/63 81 lakhs

The Board of Directors of the Company wants to avail a long term loan of Rs 1 crore to build infrastructure and improve production facilities. Also, as a CSR measure, the Company wishes to donate Rs. 1 lakh to an Orphanage.

Comment on the legality of the Company's proposals to borrow funds and make donation as mentioned above.

(June, 2008)(5 Marks)

c) Mr. Anil Adhikari, Managing Director of Asia Soap Ltd; was paid a salary of Rs.150,000 per month during the FY 2062/63. During the year (FY 2062/63), the Company recorded a net profit (after tax) of Rs.15 crores, which is an increase of 100% over the previous year's profits. As a

reward, the Board decided to pay Rs.50 lakhs as incentive to Mr. Adhikari. He was paid Rs.22.50 lakhs as incentive in the previous year. Inland Revenue Department (IRD) completed the company's tax assessment for FY 2061/62 by adding tax liability of Rs.20 lakhs to what was declared on self-assessment.

Examine the permissibility of the incentives for both the years as per the Companies Act, 2063.

(June, 2008)(5 Marks)

Answer:

b) As per section 105 of the Companies Act, 2063 [First Amendment, 2074], the board of directors of a public company or a private company availing a loan from a banks or financial institution, shall not, except with a special resolution adopted by a general meeting, carry out the following acts:

(a) Sell, donate, lease or otherwise dispose off more than seventy percent of the one or more undertakings, operating by it,

(b) Borrow money in excess of the total of paid up capital and free reserve, except the loan facility repayable within less than six months obtained in the ordinary course of business from banks and financial institutions,

(c) Contribute, donate, gift from the company's fund except the contribution donation of gift for purpose of the promotion of business of the company or its employees in any amount aggregate of which in any financial year exceed one hundred thousand rupees or one percent of its average net profit during three previous financial years whichever is lower.

The total of paid up capital and free reserves of XYZ Limited is Rs. 1.90 crore. Since the loan the company wants to avail is less than the sum of its paid up capital and free reserves, the restrictive provision of section 105 is not attracted and hence, the Board can decide to avail the loan of 1 crore.

The average profit in last three years is Rs. 62 lakhs. Since the amount to be donated is Rs.1 lakh which is more than the limit being 1% of average profit i.e. Rs.62 thousand or Rs. one hundred thousand whichever is lower, it requires to be approved, as special resolution, by a general meeting of the shareholders.

c) Section 91 of the Companies Act, 2063 provides for the remuneration, allowances, rewards etc. of the directors of a company. According to the provisions of the section, the fees, remuneration, traveling expenses and any other facilities of the directors shall be decided by the general meeting. Similarly, by adopting a special resolution, full time directors (here the managing director) can be paid a maximum of 3% of the profit after tax as incentive. Provided that, in case the tax obligation increases at final assessment of tax, then the company shall recover the money for such increased tax obligation from such directors in the proportion of the reward received by them, up to the amount of reward.

In the given case, Mr. Adhikari was paid Rs.22.5 lakhs in the last year, which was 3% of the net profit after tax. Since there has arisen an additional tax liability of Rs.20 lakhs, the company

must recover 3% of Rs.20 lakhs i.e., Rs. 60 thousand, from Mr. Adhikari, as recovery from excess incentive paid to him during FY 2061/62.

For the current year, Mr. Adhikari cannot be paid more than Rs.45 lakhs, being 3% of Rs. 15 crores, as incentive. For payment of the incentive to Mr. Adhikari, the agenda shall have to be adopted as a special resolution at the general meeting.

Question No. 106:

Extrovert Co. Ltd., having a paid up capital of Rs. 10 million, General Reserves of Rs. 8 million, Capital Redemption Reserve of Rs. 2 million, Exchange Equalisation Reserve of Rs. 1.2 million and Retained Earnings of Rs. 3.5 million decides to invest Rs. 12 million in Introvert Co. Ltd. Examine the validity of the investment decision in the light of the provision of the Companies Act, 2063?

Would your answer remain the same if Introvert Co. Ltd. were a subsidiary of Extrovert Co. Ltd.?

[December, 2007](6 Marks)

Answer:

As per the **Section 176** of the Companies Act 2063, a company cannot extend loan or provide guarantee against a loan or invest in the shares of the another company directly or indirectly exceeding 60% of the paid up capital and free reserves or 100% of free reserves whichever is higher.

In the given case, Extrovert co. Ltd. has paid up capital of 10 million and free reserves amount to 11.5 million (i.e. 8 M + 3.5M).

60% of Paid up capital & Free Reserves equals to: 60% of (10+11.5) M = Rs. 12.9 millions. Thus the Company cannot invest more than Rs. 11.5 million being higher of 60% of paid up capital and free reserves or 100% of free reserves.

As per proviso to section 176, investment in a 100% subsidiary company is outside the purview of this restrictive provision. So, had Introvert Co. Ltd. been a wholly owned subsidiary of Extrovert Co. Ltd., investment of Rs.12 million in Introvert Co. Ltd. by Extrovert Co. Ltd. would have been as per law.

Question No. 107:

Because of slowdown in the industry, XYZ Limited has suffered heavy losses since the last few years. The shareholders of the company have decided to restructure its capital of 10,00,000 Shares of Rs. 80 each as follows:

(i) The number of shares will be reduced to 7,00,000 of Rs. 80 each as per the company's Capital Restructure Plan.

(ii) The company will issue 2,00,000 shares of Rs 100 each to a creditor, Mr A. Mr. A has agreed to adjust his loan of Rs. 1,40,00,000 against the shares issued to him.

(iii)The company will issue 1,00,000 shares to its employees at Rs.70. per Share.

Examine the validity of the decisions and briefly explain the procedure to be followed to execute them in light of the provisions of the Companies Act, 2063.

[December, 2007](8 Marks)

Answer (i):

It is assumed that the face value of the shares is Rupees 100 per share. The reduction of 10 lakhs unit shares to 7 lakhs unit shares amounts to reduction of share capital that requires a special resolution of the General meeting and prior approval of the court. Necessary amendment is required to be made in the memorandum and articles of association Section 57 of Companies Act, 2063.

Answer (ii) & (iii):

As per Section 64(1) of the Companies Act 2063, a Company shall not issue or sell shares at a discount. However, Section 64(2) of the Act prescribes that notwithstanding anything contained in sub-section (1), a company may issue or sell its share at a discount, by adopting a special resolution for the issue or sale of shares at discount on the following conditions:

i) While issuing or selling of shares pursuant to capital structuring scheme of the company,
ii) While issuing or selling shares pursuant to the scheme for converting the loan of a company into shares with the consent of creditors
iii) While issuing shares pursuant to the employees share schemes
iv) While issuing shares for any other purpose as approved by the Office

Issue of shares under (ii) and (iii) to the creditor and employees respectively is valid as per section 64(ii) discussed above. The issues should be passed by the general meeting by adopting a special resolution and shares are issued or sold at the rates which shall not be below the percentage prescribed by the meeting.

The issue of shares under (ii) and (iii) above is also not caught under the ambit of the pre-emptive right of existing shareholders to subscribe to the new shares as the issue is in course of the company's capital restructuring plan [(Section 56 (9) (f)].

Question No. 108:

The Board of Directors of Asia Company Limited appointed Mr. G. Prasad as the CEO of the company and delegated the following powers to him.

(i) Appointment of Manager, Internal Audit.
(ii) Issue of debenture.
(iii) Subscribe the shares of Europe Ltd.
(iv) Sale of 100 Ropanis of Land owned by the Company.
(v) Grant loan to a subsidiary company.

Comment on the validity of the powers delegated to the CEO

[December, 2007](7 Marks)

Answer:

Section 95 of Companies Act, 2063 prescribes about the delegation authority of the Board of Directors as follows:

(1) As per sub-section (1), subject to the provisions contained in this Act and the articles of association and the decisions of the general meeting, the directors shall manage all transaction,

exercise powers and perform duties of the company through the board of directors collectively.

(2) As per sub-section (3), except as otherwise provided in this Act, the memorandum of association and articles of association or the consensus agreements in the case of a private company, the board of directors may appoint any director from amongst themselves or any employee of the company as its representative and so delegate to him/her any or all of its powers, inter alia, to do any act or thing, make correspondences or sign bills of exchange or cheques etc. on behalf of the company that such powers are to be exercised individually or jointly. In so delegating the powers, at least one director and their company secretary, if any, shall certify such delegation, pursuant to a decision of the board of directors.

(3) As per subsection (6) of the Act, notwithstanding anything contained in Sub-section (3), the board of directors shall not delegate the following powers conferred to the company and shall exercise such powers only by means of resolutions passed at meetings of the board of directors:

(a) The power to make calls on shareholders in respect of amount unpaid on their shares;
(b) The power to issue debentures;
(c) The power to borrow loans or amount otherwise than on debentures;
(d) The power to invest the funds of the company;
(e) The power to make loans.

However, the provision of Clause(e) of Sub-section(6) shall not apply to loans to be let and deposits to be received in the ordinary course of business transaction by the companies carrying on banking and financial business.

Therefore the cases mentioned above shall have to qualify the provisions of sub-section (6) for them to be valid delegation of powers to G. Prasad.

i) Appointment of Manager- Internal Audit: Not specifically debarred by sub-section (6), therefore is a valid delegation.
ii) Issue of debentures: This needs to be decided by the board every time and cannot be delegated. Therefore the delegation is invalid.
iii) Subscribe shares of Europe Ltd.: This is investment of funds of the company which needs to be decided by the board every time and cannot be delegated. Therefore the delegation is invalid.
iv) Sale of 100 Ropanis of land: Not specifically debarred by sub-section (6), therefore valid delegation. However, value of such land shall not be more than 70% of total assets of the company. Otherwise, it is not permitted to make such decision except by general meeting through special resolution pursuant to section 105 of the Act.
v) Granting of loan to a subsidiary company: This needs to be decided by the board every time and cannot be delegated. Therefore the delegation is invalid.

Question No. 109:

Is it mandatory for all companies to constitute an audit committee under the Companies Act, 2063? Briefly discuss the provisions regarding constitution and functions of the Committee

[December, 2007](5 Marks)

Answer:

Section 164 of the Companies Act, 2063 prescribes provisions regarding Audit Committee. According to it a listed company with paid up capital of thirty million rupees or more or a company which fully or partly owned by the Government of Nepal has to form an audit committee under the chairpersonship of a director who is not involved in day to day operation of the company and consisting of at least three members. The Act also prescribes the disqualification of the member of the committee. In other words a person who is a close relative of the chief executive of a company should not be appointed as a member of the committee. Similarly, the Act prescribes the provision that at least one member of the audit committee should be an experienced person having obtained professional certificate on accounting or a person having gained experience in accounting and finance with bachelor degree in commerce or economics.

It is the board of directors to arrange all means and resources as may be adequate for the fulfillment of responsibilities of the audit committee. Audit may fix its internal rules of procedures on its own. Section 165 prescribes the functions, duties and powers of audit committee. Major functions, duties and powers of the committee may be noted as follows:

a) To review the accounts and financial statements of the company and ascertain the truth of the facts mentioned in such statements;
b) To review the internal financial control system and the risk management system of the company;
c) To supervise and review the internal auditing activity or the company;
d) To recommend the names of potential auditors for the appointment of the auditor of the company, fix the remuneration and terms and conditions of appointment of the auditor and present the same in the general meeting for the ratification thereof;
e) To review and supervise as to whether the auditor of the company has observed such conduct, standards and directives determined by the competent body pursuant to the prevailing law as required to be observed in the course of doing auditing work;
f) Based on the conduct, standard and directives determined by the competent body pursuant to the prevailing law, to formulate the polices required to be observed by the company in respect of the appointment and selection of the auditor;
g) To prepare the accounts related policy of the company and enforce, or cause to be enforced, the same;
h) Where any regulatory body has provided for the long term audit report to be set out in the audit report of the company, to comply with the terms required to prepare such report;

To perform such other terms as prescribed by the board of directors in respect of the accounts, financial management and audit of the company.

Question No. 110:

Casting Vote in Company meetings.

[December, 2007](5 Marks)

Answer:

A company holds a large type of meetings. Among them, meetings of shareholders and board of directors along with casting of vote have been presented below:

i. Casting vote at general meeting:

Section 74 of Companies Act, 2063 prescribes about the general meeting discussion and decision through casting votes as follows:

(1) A general meeting shall be chaired by the Chairperson of board of directors and, in his/her absence, by the person nominated by the directors from amongst themselves.

(2) Every matter to be discussed in a general meeting shall be presented in the form of resolution. The chairperson of the meeting shall declare whether a resolution has been adopted or not.

(3) The opinion of majority of the shareholders present in the meeting shall be deemed to be the decision of that meeting on every matter put to the vote. Such voting may be taken in such manner including a show of hands, voice voting, division of shareholders in groups or poll (use of ballet paper) as well as other appropriate method as prescribed by the Chairperson.

Provided, however, that in the case of a special resolution, the resolution shall be deemed to have been adopted by the meeting only if the shareholders representing seventy five per cent shares out of the shareholders present in the meeting vote in favor of the resolution.

(4) If the votes are evenly divided for and against at a general meeting, the Chairperson of the meeting may caste the decisive vote (i.e. second time). Provided, however, that the Chairperson shall not be deprived of the right to vote in the capacity of shareholder.

ii. Casting vote in board of directors meeting:

Section 97 of Companies Act, 2063 prescribes about the meeting of board of directors as follows:

(1) Meetings of the board of directors of a private company shall be held as mentioned in the articles of association.

(2) Meetings of the board of directors of a public company shall be held at least six times in a year.

Provided, however, that the interval between any two meetings shall not exceed three months.

(3) The directors shall be present in personal meetings of the board of directors of a company. The presence of the proxy of a director in his/her stead shall not be held valid.

(4) No meeting of the board of directors shall be held unless it is attended by at least fifty one per cent of the total number of directors of the company.

Provided, however, that any director who is not entitled to take parting any matter to be discussed in a meeting of the board of directors under this Act shall not be counted for the purposes of this sub- section.

(5) If a meeting of the board of directors cannot be held because of the lack of presence of directors in the number mentioned in Sub-section (4), another meeting may be called by giving a notice of at least three days. Even if such meeting is not attended by the directors in the number mentioned in Subsection (4), the proceedings and decisions conducted and made by the attending directors shall be valid.

(6) The decision of a majority in a meeting of the board of directors shall be binding, and in the event of a tie, the Chairperson may exercise the casting vote, in addition to a vote cast by him/her as a director.

Provided, however, that any director who has any personal concern or interest in any matter to be discussed in a meeting of the board of directors shall not be entitled to take part in such discussion and vote on the matter.

(7) Minutes regarding the names of directors present in the meeting of board of directors, the subjects discussed and the decisions taken thereon shall be recorded in a separate book, and such minute book shall be signed by at least fifty one per cent of the total directors present in the meeting.

Provided, however, that, if any director puts forward any opinion opposed too or differing from the decision in the course of discussions on any subject in a meeting, he/she may mention the same in the minute book

(8) Any decision shall not be deemed invalid merely for the reason that there is no signature of any member.

(9) Notwithstanding anything contained in Sub-section (3), (4), (5) and (6),except in the cases that are so expressly prohibited by the memorandum of association or articles of association, if all the members of the board of directors or a sub-committee of directors so consent in writing in regard to any act or resolution permitted to be done or adopted by the board of directors or such sub-committee, such act may be done even without holding a meeting by recording such consent in the minute book.

(10) The consent referred to in Sub-section (9) shall be deemed to be a decision of a meeting of board of directors.

Question No. 111:

Mrs. Fugitive failed to pay final call on 100 shares allotted to her even after the publication of the statutory notice. Draft a resolution (indicating the type of meeting) for the forfeiture of the shares

(June, 2007) (5 Marks)

Answer:

Board Resolution for forfeiture of shares:

Resolved that pursuant to Section 53, Sub-section 3 of the Companies Act, 2063 and Rule …..... of the Company's Article of Association, the under mentioned shares in the capital of the company be and are hereby, forfeited for non-payment of the final call of Rs..... per share payable on or before ....., due notice of which had been served upon the defaulting shareholder in the National Daily Newspaper Kathmandu Post dated ....

Shares	Nos.	Share Holder
Equity Shares	100	Mrs. Fugitive

Resolved further that as per the provision of Sub-section 4 of Section 53 of the Companies Act, 2063, Rs..... paid on the shares and Rs..... declared as dividends on the said shares be paid to Mrs. Fugitive together with interest at the prescribed rate within 15 days of forfeiture of the shares.

Question No. 112:

The Articles of Association of a Company states that a director shall not vote in respect of a contract in which he is interested. In a resolution put up for approval of the Shareholders, can a director exercise his voting right in favour of a contract in which he is interested?

(June, 2007) (5 Marks)

Answer:

As per Section 70 (1) of the Companies Act, 2063, no person shall be entitled to attend or vote in a General Meeting in his capacity as a shareholder, either in person or proxy, on discussion to be held in respect of any contract entered into or to be entered into between himself and the Company. Section 70 (2) prohibits a director or his partner from participating and voting in General Meeting on any agreement/ contract in which he is interested.

Hence, the director cannot participate and vote either as a shareholder or a director in a resolution put up for the approval of the shareholders in a General Meeting.

Question No. 113 :

Shristi Limited, a public limited company suffered from severe financial crisis and hence the management of the company decided to merge with Dristi Limited, a private limited company. Shristi Ltd. proposed this agenda in its Annual General Meeting. In the Annual General Meeting, shareholders representing 70% of the total shares were present in person and proxy altogether. Out of total present, shareholders representing 80% of the shareholders decided for the agenda. Based on the above information, answer the following questions in the light of Company Act, 2063:

i. Can the resolution be assumed to be passed from the AGM of Shristi Limited?
ii. Does Dristri Limited also require to pass this agenda as a special resolution?
iii. What would be the status of Dristi Limited by virtue of the merger of Shristi Limited?

[June, 2007] (2+2+2=6 Marks)

Answer:

i. As per Section 83 of the Companies Act 2063, agenda to merger of a company with another company requires a special resolution and provision of Section 74 of the Act requires shareholders representing 75% of total shares present in the meeting to pass the special resolution. In the case of a special resolution, the resolution shall be deemed to have been adopted by the meeting only if the shareholders representing seventy five per cent shares out of the shareholders present in the meeting vote in favor of the resolution.
Accordingly, a resolution to merge Shristi Limited with Dristi Ltd. requires special resolution with 75% vote of total present shares. Since there were shareholders representing 70% of the total votes present in the AGM, assuming there were at least 3 shareholders present in the meeting, the quorum is sufficient. Similarly, out of the total present, shareholders representing 75% of the shares required to pass special resolution. In the case of Shristi Ltd., 80% of the total present shares were voting for the resolution and hence assumed to be passed as special resolution.

ii. As per section 83 of Companies Act, 2063 following agenda shall be presented as special resolution for making decision:
   a) Increasing the authorized capital of the company,
   b) Decreasing or altering the share capital of the company,
   c) Altering the name or main objectives of the company,
   d) Amalgamating one company into another company,
   e) Issuing bonus share,
   f) Buying back of own shares by the company,
   g) Selling shares at a discount,
   h) Converting a private company into a public company or vice versa,
   i) Such other matter in respect of which the company is required by this Act or the articles of association to adopt a special resolution.

Hence, as per Section 83 of the Companies Act, 2063, Dristi Limited and hence, it is required to pass through special resolution.

iii. As per section 177 of Companies Act, 2063, a public company may, by adopting a special resolutions in its general meeting to that effect, be merged with another company. A public company, upon merging into a private company or a private company, upon merging into a public company shall stand as a public company. Hence, by virtue of the merger of Shristi Limited, Dristi Limited now becomes a public limited company as per Section 177 of the Companies Act, 2063.

Question No. 114 :

Discuss the validity of formation of the following companies:

i) A to Z Soap Limited, a public limited company was established on 2063/7/1 with the paid up capital of Rs. 5 million

ii) National Bank Limited wishes to establish itself with Rs. 50 million paid up capital an "A" class financial institution.

iii) Capital Stock Exchange Pvt. Limited, wishes to establish as a private limited company with Rs. 50 million paid up capital.

[June, 2007](2 Marks)

Answer:

i) As per Section 11 (1) of the Companies Act, 2063 to establish public limited company requires minimum paid up capital of rupees 10 million. However, sub section (2) of the section envisaged that if any public limited company was established earlier before the Act came into effect i.e. 2063/7/24, then the capital shall be increased to 10 million upto 22nd Aswin 2065. Accordingly, A to Z Soap Limited was established with rupees 50 million paid up capital before the Act came into force and hence the establishment of the same is valid. But the paid up capital of the Company should be increased to Rs. 10 million upto 22nd Aswin 2065.

ii) Section 11 (1) of the Companies Act states that the paid up capital of a public company shall be a minimum of ten million rupees, except as otherwise provided in the prevailing law or in a notification by the Government of Nepal in the Nepal Gazette that the paid up capital of any particular company shall be in excess of the said required minimum.

Here, the National Bank Limited, a proposed national level 'A' class bank is also governed by the Bank and Financial Institution Act, 2073. The licensing policy prepared by Nepal Rastra Bank as per Bank and Financial Institution Act, 2073 requires the paid up capital of A class commercial bank to be minimum of Rs. 8 billion. Hence, National Bank Limited cannot not be established with the paid up capital of Rs. 50 million.

iii) As per Section 12 of the Companies Act, 2063, notwithstanding anything mentioned in the Act, company operating in the areas of Banking transaction, financial transaction, insurance business, stock exchange business, pension fund or mutual fund or company operating other business or transaction as prescribed must be established as public limited company.
In the given case, Capital Stock Exchange Pvt. Limited, wishes to establish as a private limited company. Hence, it cannot be registered as a private company to operate a stock exchange pursuant to section 12 of the Companies Act, 2063.

Section 11 (1) of the Companies Act states that the paid up capital of a public company shall be a minimum of ten million rupees, except as otherwise provided in the prevailing law or in a notification by the Government of Nepal in the Nepal Gazette that the paid up capital of any particular company shall be in excess of the said required minimum.

As per section 41 of Securities Act, 2063, the paid up capital of a public company carrying on a stock exchange shall be so prescribed by the Securities Board, from time to time, as it shall not to be less than fifty million rupees; and the body corporate shall maintain such financial source as may be adequate for the provision of stock exchange that it carries on.

Hence, Capital Stock Exchange Pvt. Ltd., being a company dealing in stock exchange business shall not be established as private limited company though the capital requirement of the Company as per the Companies Act, 2063 and Securities Act, 2063 is met.

Question No. 115:

What would be the legal status of the Company after reduction of Share Capital? Advice the company, with reference to the provisions of the Companies Ordinance 2062.

(June, 2006) (5 Marks)

Answer:

According to section 11(1) of the Companies Act 2063, the minimum paid up capital of a public company shall be Rs. 10 million, except otherwise provided for the time being in force or prescribed by Government by a notification published in the Nepal Gazette requiring higher amount of paid-up capital for any specific company. Accordingly, after reduction of paid up capital of Pioneer Limited in pursuant to section 57 of the Act, being Rs. 7.5 million which is below the minimum paid up capital required for any public limited company. Further, as per section 14(1), a public company shall be converted into a private company, if a public company cannot maintain its paid-up capital prescribed in section 11 or the paid up capital prescribed in section 11 cannot be maintained due to reduction in its share capital pursuant to section 57 of the Act. Accordingly, as per the provision of section 14 of the Act, the pioneer Limited shall be converted into a private company, and henceforth all the provisions of private company shall be applicable.

Question No. 116:

M/s Brilliant Company Limited proposed to issue shares at 10% discount on its face value of Rs. 100 each. The Company approach to you to seek your legal advice whether the company can issue its shares at 10% discount or not? Advice the company with reference to the provisions of the Companies Ordinance.

(June, 2006) (6 Marks)

Answer:

Section 64(1) of Companies Act, 2063 provides that, a company shall not issue or sale shares at discount. However, sub-section (2) of the said section provides that, a company may issue or sell its shares at discount which shall not be below the percentage prescribed in the general meeting by adopting a special resolution for the issue or sale of shares at discount on the following conditions:

a) For the capital restructure scheme of the company.
b) For the scheme of converting the loan of a company into share with the consent of creditors.
c) For issuing shares under employee share scheme.
d) For issuing shares for any other purpose as approved by the office.

In the given case, M/s Brilliant Limited has not adopted any such scheme referred under section 64 (2) of the Act and simply propose to issue share at discount. Therefore, as per the provisions of the Companies Act 2063, M/s Brilliant Limited cannot issue its shares at 10% discount.

Question No. 117:

Ram Singh, a fresh law graduate was appointed as the Company Secretary of ABC Limited having a paid up capital of 25 million before the promulgation of the Companies Ordinance 2005. He is also serving as Company Secretary to three other Companies A, B and C with paid up capital of 7.5 million, 15 million and 12 million respectively. ABC Ltd. hold 35% shares in B and also exercises control in the formation of its Board. B holds 75% shares in C. Discuss the validity of Ram Singh's appointment after the commencement of the Ordinance.

(June 2006)(5 Marks)

Answer:

Section 185 of Companies Act, 2063 prescribes about the appointment of company secretary as follows:

(1) A public company with the paid –up capital of ten million rupees or more shall appoint to the post of company secretary a Nepalese citizen who has the qualification mentioned in Sub-section (2).

(2) A Nepalese citizen who has worked in the related field for at least two years after obtaining the professional certificate of company secretary issued by a native or foreign body authorized to issue the professional certificate of company secretary pursuant to the prevailing law or who has worked in the related field or in the field of company management for at least three years after doing at least bachelor degree in law, management ,commerce or economics may be appointed to the post of company secretary.

Provided, however, that this provision shall not apply to the company secretary who is incumbent at the time of commencement of this Act for three years after the date of commencement of this Act.

(3) No director of the concerned company shall be eligible to be appointed as the company secretary of such company.

(4) A person shall not be appointed to the post of company secretary of more than one company at the same time.
Provided, however, that this provision shall not bar the appointing of the company secretary of any principal company to the post of company secretary of the subsidiary company of such company.

(5) Where it is provided by this Act, the prevailing law or articles of association that any act has to be done by or through the company secretary, and the post of company secretary remains vacant in the company or any reason the incumbent company secretary fails to do such act or shows has inability to do such act, then any such employee of the company, who has the qualification referred to in this Act, as designated by the board of directors to do such act may perform such act in the capacity of company secretary.

In the given case, as per section 185(2) of Companies Ordinance, 2005 a law graduate with three years experience in related field or management of the Company may be appointed as the Company Secretary. However, this provision is not applicable to a company secretary appointed before the commencement of this Act for a period of three years. So, even if Ram Singh is a fresh law graduate, his appointment in the post of company secretary is valid.

Further, sub-section 4 states that no person shall be appointed as company secretary in more than one company. Proviso to the sub-section provides that this provision shall not hinder appointment of the company secretary of a holding company as company secretary of its subsidiaries.
Ram Singh's appointment in Company A is outside the preview of the Act since its paid up capital is below the threshold of 10 million. Company B and Company C are subsidiaries of ABC Ltd. by virtue of section 142(1)(a) and 142(2). Therefore, by a combined application of proviso to section 185(4) and section 142, Ram Singh can continue as the company secretary of ABC Ltd., A, B and C.

Question No. 118:
What do you understand by "special business" with regards to General Meeting?
[June, 2006](5 Marks)

Answer:
In case of an AGM, the items of business other than i) the consideration of Accounts and Directors' and Auditor's Report ii) declaration or dividends iii) appointing of directors in place of those retiring and iv) appointment of and fixation of remuneration of auditors, which are considered as ordinary business, are deemed as special business. In the case of any other meeting, all business shall be deemed special. Hence, all businesses transacted at an extraordinary meeting are special business.
The notice convening the meeting at which special business will be transacted should state the nature of the special business. Otherwise, such business cannot be transacted in the meeting.

Question No. 119:

Mr. Shyam Sharan wishes to appoint his wife (not a shareholder) as his proxy to attend the AGM of Nepal dot com Ltd. He fills the Company's proxy form and hands it over to his wife who goes to attend the AGM carrying the proxy (instrument) with her but is denied entry. Is the Company justified in denying the proxy? **[December, 2003](5 Marks) [June, 2006](5 Marks)**

Answer:

Section 71 of Companies Act, 2063 prescribes about the appointment of proxy in the AGM as follows:

As per sub-section (2), except in cases where the articles of association of a company prohibit the proxy of a shareholder from exercising the right to vote, any shareholder may, subject to this Section, appoint another person as his/her proxy to attend the general meeting and vote instead of him/her.

As per sub-section (3), subject to Sub-section (1) or (2), where a shareholder who is entitled to vote is not able to personally attend the meeting, he/she may appoint a proxy to vote in his/her stead, by an instrument of proxy executed in the prescribed format and signed by him/her and the proxy so appointed shall be entitled to attend or vote in the meeting, subject to the provisions contained in Section 72.

In the given case, Nepal dot com Ltd is not justified in denying the right of a proxy to the wife of Mr. Shyam Sharan on the following grounds since as per section 71 (2) of Companies Act, 2063, any person can be appointed as a proxy, not necessarily a shareholder.

Question No. 120:

Describe the conditions of the winding up of a Company (Public Ltd.) by the office of the Company Registrar.

[June, 2006](5 Marks)

Answer:

1) The Office may cancel the registration of a company in the following circumstance:
   a) If the promoter of the company makes an application, showing a reason for the failure to commence the business of the company, and accompanied by the prescribed fees, for the cancellation of the registration of the company;
   b) If the company is in default in submitting to the Office the returns as referred to in Section 80 or fails pay the fine as referred too in Section 81 for three consecutive financial years; or
   c) If based on the proofs received in the course of administration of the company, the Office has a reasonable ground to believe that the company is not carrying on its business or the company is not in operation.
2) If it is required to cancel the registration of any company pursuant to Sub-section (1), the Office shall, prior to the cancellation of registration, give a notice, accompanied by the reason for such registration, to the concerned company.

3) While sending a notice to a company pursuant to Sub-section (2), the notice shall be sent to the company at its registered office or to any office or such company if the address of the registered office of such company is not registered with the Office or if the office of the company is not located at the address registered and to the memorandum of association of the company if even address of such officer is not available to the Office or is not known.
4) A notice given pursuant to Sub-section (2) shall also be published in a national daily newspaper, as *per* necessity.
5) If the company fails to make an application, specifying the reasons that the registration of the company should not be canceled, within two months from the date of receipt by the company of a notice pursuant to Sub-section (2) or, despite the making of such application, the reasons specified are not found reasonable, the registration of such company may be canceled.
6) If the registration of a company is canceled pursuant to Sub-section (5), information thereof shall be given to the concerned directors and shall also be published in a national daily newspaper.
7) If the registration of a company is canceled pursuant to Sub-section (5), if there exists any kind of liability of the company, the liability of the officer or shareholder of the company shall continue to exist;; and nothing contained in this Section shall be deemed to bar the instituting of necessary legal action against them to have such liability fulfilled.
8) The assets, rights, benefits or liabilities held in the name of the company at the tine of cancellation of its registration pursuant to Sub-section (5) shall devolve on its shareholders in the proportion of their shareholding.
9) Provided, however, that the title and ownership of any property which has been held by the company as a trustee in favor of any other person shall to devolve on the shareholders.
10) If any debt to be repaid by or any liability to be performed/discharged by the company of which registration has been canceled pursuant to this Section cannot be settled from the assets, rights, or benefits devolved on the shareholders pursuant to Sub-section (8), the shareholders, directors or officers who were involved in the management of such company and responsible for giving rise to the situation as referred to in Sub-section (1) shall personally bear such remaining loan or liability.
11) A company of which registration is canceled pursuant to this Section shall not be allowed to carry on any business by the name of the same company.
12) Following the cancellation of registration of any company pursuant to this Section, the Office shall return to the shareholders only such property, if any, remaining after deducting therefrom the expenses incurred in the cancellation of the registration of that company.

Question No. 121:

A Company was established to carry on trade of a "Product Merchant" in Germany. It entered in to speculative contracts with Merchants of Kathmandu for purchase of jute. The memorandum contained no express power to deal in jute, but the clause 'K' of memorandum reads, "to carry on

any other business whether manufacturing or otherwise", the purchase of jute is intravires or ultravires to the Company, decide

[December, 2005](5 Marks)

Answer:

The company which was established to carry on trade of a " product merchant" in Germany and it entered in speculations contracts with merchants of Kathmandu, it is ultra vires to the company pursuant to section 103 of Companies Act, 2063 because the MoA of the Company has given power and to be involved only in the expressed objective which it has clearly mentioned in the memorandum, the clause 'k' of memorandum " To carry on any other business whether manufacturing or otherwise" is indefinite and unclear clause which does not give power to the company to enter in the speculative contract. The Company itself is no clear (sure) whether it is doing right or not.

There are basically three reasons for why doctrine of ultra vires required

1) The capital of the company is contributed by the shareholders and held by the company as though trust for them. So such a fund must be dedicated in the defined objects.
2) It affords a certain degree of protection to the creditors also. The creditors trust the company not the shareholders, and they have to seek their repayment only out of the company's assets.
3) By confining the corporate activities with in a defined field, the statement of object serves the public interest also.

The application of this doctrine was first demonstrated in a Ashbury Railway Carriage and Inon Co. Ltd. vs Rechean in 1874. Here, the memorandum of company stated its objects as the objects for which the company is established are to make and sell or lend on hire, railway carriages and wagons and all kinds of railway plants etc. to carry on business of mechanical engineers, and general contractors. The company entered in to a contract with Riche a firm of railway contractors to finance the construction of railway in Belgium, the company however repudiated the contract as being ultra vires. The situation of given case and the Riche's is resembles, so the object of clause the 'otherwise' does not empower to the company to entered in to contract to purchase jute with merchants of Kathmandu, the contract is null and void, and ultra vires to the company.

Question No. 122:

Goodwill Ltd. has resolved to reduce its share capital by canceling its reserve capital. The consortium of bankers having interest in the Company seeks your advice to prevent the Company from implementing the resolution. Guide them.

[June, 2005](5 Marks)

Answer:

Reserve Capital is that part of the uncalled capital of a Company which can be called up only in the event of winding up. It is thus available only for the creditors on the winding up of the Company.

In Midland Rly Carriage Co. Rs (1904), it was held that the Company can neither charge reserve capital nor cancel it in a reduction of capital.

Sub-section (7) and (8) of Section 53 of Companies Act, 2063 prescribes about the reserve capital. As per section 57(7), a company which has been making profits for a period of three consecutive years or more may, by a special resolution adopted at its general meeting determines that a call may not be made in respect of certain portion of its share capital not called on except in the case of liquidation or insolvency of the company.

Further, as per section 57(8), after a special resolution has been adopted under Sub-section (6), a call may not be made on the amount of share capital that is yet to be called on as mentioned in that resolution except where the general meeting, by adopting another special resolution, decides to make such call and except in the case of liquidation or insolvency of the company.

Since the creditors (consortium bankers) only have right to the reserve capital of Goodwill Ltd., the Company cannot reduce its capital by canceling its reserve capital.

Question No. 123:

Due Diligence Limited, duly incorporated with office of the Registrar's of companies having registered office at Pokhara, which has a branch office in Kathmandu too. The substantial business transactions of the company are from Kathmandu office. The company has maintained its books of accounts of whole transactions of the company in Kathmandu for its convenience. Examine the validity of maintaining books of accounts in Kathmandu, with reference of provisions of companies Act. 1997.

[June 2005](5 Marks)

Answer:

As per the provision of section 108 (3) of Companies Act 2063, the company shall not maintain its books of accounts at any place other than its registered office, unless approved by the office of the Company Registrar. Therefore, the gamut of the section is that every company shall keep books of accounts at its registered office. Provided that, with the approval from the office of the Company Registrar, books of accounts may be kept at such other place than the registered office. In the given situation, Due Diligence Limited whose registered office is at Pokhara and branch office at Kathmandu, maintained the books of accounts of the whole transactions in Kathmandu branch office without getting approval form the office of the Company Registrar. Therefore, Due Diligence Limited violated the provisions of the Act and the action of the company for maintaining books of accounts without getting approval, in Kathmandu branch office is not compliance with the provisions of the Act.

Question No. 124:

Bountiful Unlimited having an authorized capital of 500 Millions and paid up capital of 200 Millions adopts an ordinary resolution to raise additional share capital amounting to 500 Million. The company has resolved to segregate 50M to employees, 300 Million to the existing shareholders and the rest to the general public. The prospectus states that if the existing shareholders refuse to take the shares within 30 days, the unsubscribed shares would be sold to the public.

Point out the irregularities in the proposed issue and suggest the right course of action. Can Bountiful Unlimited issue right shares at a premium?

[June 2005](5 Marks)

Answer:

The following irregularities are observed:

b) **Issuance of shares:**

Since the share capital of Bountiful Unlimited after the issue will exceed its authorized capital, section 83(a) of Companies Act, 2063 warrants a special resolution of General Meeting to increase its authorized capital by amending its memorandum of association. Hence, the adoption of ordinary resolution is not valid. The approval of Office of Company Registrar is also required to be taken.

c) **Issuance of shares to employees:**

The Company can segregate shares 50M shares to its employees as there is no any limitation for such allotment.

d) **Issuance of shares with priority to existing shareholders:**

As per section 56(8) of Companies Act 2063, the existing shareholders shall have the first right to subscribed the shares issued under Sub-section (7) in proportion to their respective shareholding.

As per section 56(9), notwithstanding anything contained in Sub-section (8), no shareholder of a company existing for the time being shall have the first right over the following shares to be issued by the company:

(a) Shares issued by the company for any consideration other than cash,
(b) Shares issued to any person under any right or facility provided in accordance with the terms of an agreement concluded with the company,
(c) Shares issued under an employee share scheme,
(d) Shares issued in accordance with an agreement concluded between the company and its creditors,
(e) Shares existed on converting preference shares into ordinary shares or debentures into shares by the company,
(f) Shares issued in accordance with an agreement between the concerned parties in the course of management of the company, restructuring of its capital or loan or in the course of

implementation of a restructuring program agreed upon between the relevant parties in accordance with the prevailing law on insolvency or in the course of implementation of a program of conversion of a public company into another public company.

Hence, in the given case, shares worth Rs 150M cannot be sold directly to the general public outright.

e) **Time limit for share issuance:**

As per sub-section 11 of section 56 of Companies Act 2063, a time limit of at least 35 days shall be given to the existing shareholders to purchase the shares. Thus, time limit of 30 days set in the prospectus is not correct.

f) **Issuing unsubscribed shares to the public:**

If existing shareholders fail either to subscribe the shares or to sell or transfer the right to subscribe shares to anyone else within the said time limit, such shares may be sold in any other manner as decided by the board of directors of the company.

g) **Issuing shares at premium:**

Yes, Bountiful Unlimited can issue right shares at a premium by giving prior notice to the office of the registrar of Company in compliance with section 29 of Companies Act, 2063 as follow:

1) Any public company entitled to issue securities publicly pursuant to prevailing securities related law may issue shares at premium subject to term & conditions prescribed at such prevailing securities related law. However, any private company or a public company not making provision for issuing shares publicly may issue share at premium if assets exceed liabilities after taking approval of general meeting.
2) Where the shares are sold at a premium pursuant to Sub-section (1), a sum in excess of the face value, out of the proceeds thereof, shall be deposited in a premium account to be opened to that effect.
3) As per sub-section (4), in making a request for approval of the Office to issue shares at a premium pursuant to Sub-section (1), the audited financial statements for three years shall be provided to the Office.

Question No. 125:

True and Fair Limited called its Tenth Annual General Meeting on 7th April 2004. Then notice of Annual General Meeting was posted on 22nd March 2004. One member holding 50 shares challenges the resolution passed at an AGM on the ground that the notice was not valid. Advise him in the light of the provisions of the companies Act 1997

[June, 2005](5 Marks)

Answer:

Section 67(2) of the Companies Act, 2063 states that a notice of at least 21 days in advance for the purpose of holding an AGM and of at least 15 days in advance for the purpose of holding an

EOGM of a public company, shall be given to be discussed at the meeting. Notice regarding the same shall also be published at least two times at newspaper of national level. The test of the provision of the section is that, an AGM cannot ordinarily be called by giving less than 21 day notice in writing. The provision of the section implies a notice of 21 whole or clear days i.e. a period of 21 days excluding a day from which it ran and the day on which the notice expired. Therefore at least 21 day notice implies, that the day of the service of the notice and the day of meeting were excluded on computation of 21 days. Accordingly, in the given situation the date of the service of the notice was on 22nd March and the date of the AGM was on 7th April 2004. Excluding the date of meeting and date of service of notice there were only 15 days and True & Fair Limited was given less than 21 days short notice to the members. Therefore, the statutory requirement of Sec. 67(2) of the Act, regarding the service of notice has not been compiled. Hence, short notice given to the members will render the entire meeting void and invalidate the resolutions passed thereon. Therefore the shareholders will succeed in the given situation.

Question No. 126:

Under the Companies Act (Nepal), there are certain restrictions on the public limited companies, what are these?

[June, 2005](5 Marks)

Answer:

In addition to the conditions stated in the Articles of Association and the Memorandum of Association, a Public Limited Company is not authorized to do following activities pursuant to section 10 of Companies Act, 2063:

(a) The company shall carry on all of its activities and transactions by its name.
(b) A public company shall add the word "limited" to its name as the last word.
(c) A company shall not open a partnership or private firm.

Question No. 127:

ABC Ltd. invited the public to subscribe to its shares by issuing a prospectus and keeping the offer open from Shrawan 01, 2060 to Shrawan 15, 2060.

The Company didn't allot shares till Kartik 30, 2060, nor did it refund the money because there would be a shortfall of 7.5% in its refund owing to expenses incurred on issue management.

Examine the liability of the Company and its promoters. Would your answer be any different had the default been because of non-receipt of minimum subscription?

[December, 2004](5 Marks)

Answer:

Section 28 of Companies Act, 2063 prescribes about the allotment of shares as follows:

(2) Where a public company invites the general public to apply for the subscription of its shares it shall allot the shares and give the shareholders a notice in the format as prescribed, within a maximum period of three months after the date of closure of share issue.
Provided, however, that in cases where at least fifty percent of the total shares issued publicly cannot be sold failing a guarantee/underwriting agreement on the subscription of at least fifty percent of the publicly issued shares, no shares shall be allotted.

(3) If the company makes an application, explaining the reasons for failure to allot shares within the time-limit set forth in Sub-section(1), owing to the circumstance mentioned in the proviso to that Sub-section within seven days after the expiration of that time-limit, the Office may extend the time limit for up to three months for the allotment of shares. If the shares cannot be allotted even within such extended time limit, the company may allot such shares through negotiations or any other methods.

(4) If the allotment of shares cannot be made even within the time –limit as referred to in Sub-section (1) or (2), the amount received for the subscription of shares as well as an interest thereon, as prescribed, from the day of expiration of such time-limit (i.e. share application) to the day of refund of such amount shall be refunded.

(5) If the funds are insufficient to refund the amount required to be refunded pursuant to Sub-section (3), the shortfall amount shall be borne by the promoters and directors personally.

(6) Where the allotment of shares pursuant to Sub-section (1)or (2) is made discriminatorily or with intent to cause any loss or damage to any investor may file a petition, setting out the reasons for the same, in the court on that matter.

(7) If a petition is filed pursuant to Sub-section 5), where any investor has sustained any loss or damage by reason of the deliberate violation of this Section by any officer of the company or permission given by such officer to anyone to commit such violation, the court may issue an order for realization from such officer personally of compensation for such loss or damage as well as reasonable expenses incurred in the legal action.
In the given case, ABC Ltd. failed to allot shares within the stipulated time period of three months prescribed by section 28 of Companies Act, 2063. Hence, it is required to make refund along with interest from Kartik 15, 2061 to the date of refund. The shortfall of 7.5% should be paid by the promoters and directors pf the company from their personal funds.
Had the default been due to non-receipt of minimum subscription, and had ABC Ltd. applied, within 7 days of the expiry of the three months' time, for time extension, the Company Registrar would extend the time limit for allotment of shares by three months till Magh 15, 2061.

Question No. 128:

A resolution moved in the AGM of a Company for declaration of 40% dividends as against 30% recommended by the Board of Directors was put on vote through a show of hands by the Chairman. 50% of the shareholders voted in favour of the resolution and 40% of them voted against it. The Chairman holds the remaining 10% shares.

The Chairman is against the proposal. Advise him on how he can get the resolution defeated?

[December, 2004](5 Marks)

Answer:

Section 74 (4) of the Companies Act, 2063 states that if the votes are evenly divided at the General Meeting, the chairman may exercise his casting vote. Provision to this sub-section provides that the Chairman shall not be deprived of the right to vote in his capacity as a shareholder. In the given case, the chairman is in a position to first exercise his vote as a shareholder which would bring the votes to a tie. The chairman can then exercise his casting vote and get the resolution defeated.

However, proviso to sub-section 6 of section 77 states that no decision shall be made in a General Meeting in a manner that rate of dividend is more that proposed by the Board of Directors. Thus the proposed resolution cannot be passed at all by the General Meeting.

Question No. 129:

Fruti Company Limited, incorporated on 2060/04/01, has published its prospectus for an IPO. The prospectus contains, among other, the following clauses **[December, 2004]**5

b) The nominal value of each share shall be Rs. 125.
c) Application should be accompanied by Share application money of Rs. 75 per share.
d) Share allotment, as per the provision of Companies Act, 2053, cannot be made if minimum subscription of 40% of the total authorized capital of the Company is not received.

Comment on the clauses on the prospectus.

Answer:

a) Fruti Company Limited is a public company. Nominal value of company including public company has been prescribed under section 27 of Companies Act, 2063. As per section 27(2) of the Act, the nominal value of share of a public company shall be fifty rupees per share or shall be equivalent to such amount exceeding fifty rupees as is divisible by the figure ten as provided in the memorandum of association and articles of association. Hence Fruti Ltd. cannot issue shares with face value of Rs. 125 per share.

b) As per sub-section (3) of section 27 of the Act, in inviting an application by a public company for the subscription of its shares, no amount exceeding fifty per cent of the face value of each share shall be demanded with the application.

Provided, however, that in raising capital by a company which has been in operation since at least three years ago by publishing its audited financial statements for its last three years, at the time of publication of its prospectus, this provision shall not be applicable.

In the given case, Fruti Co. Ltd. is a new Company and therefore, it cannot raise more than 50% of the nominal value of the share as application money.

c) Proviso clause of section 28(1) provides that allotment of shares shall not be made if at least fifty percent of the shares cannot be sold. Hence, the contention of Fruti Co. Ltd. that minimum subscription is 40% is wrong. It cannot allot shares unless 50% shares are subscribed.

Question No. 130:

The Finance director, in collusion with Director-Sales, of over ambitious Ltd. have financially benefited themselves from certain transactions entered with the Company but the Board of Directors refuse to take any legal action against the corrupt directors. Can shareholders of the Company institute a suit on behalf of the company?

Is out of court settlement possible once such a suit is filed?

[June, 2004](5 Marks)

Answer:

Section 138 of Companies Act, 2063 prescribes about the protection of rights as follows:

1) If, on behalf of a company, any director or officer of the company does any act beyond his jurisdiction, any shareholder of such company may make a petition to the Court to prevent such act.

   Provided, however, that no petition may be made under this Section in connection with any act or action done or taken or intended to be done or taken for the fulfillment of any liability created from any act or action already done or taken by the company.
2) If , based on the report received by the Office pursuant to Section 124 in respect of any company, the Office thinks that the business of such company could be carried on or is being carried on in such a manners to be prejudicial to the rights and interests of any of or all shareholders of the company or any specific class or group of its shareholders or that any act done or intended to be done by the company or the failure of the company to do any act required to be done has resulted in or would result in a prejudice to the interests of such shareholders, the Office may make a complaint/ petition to the Court against such company or its directors or officers.
3) On receipt of a petition as referred to in Sub-section (1) or the Court may inquire into the concerned company or its directors or officers and issue an appropriate order.

Question No. 131:

Gyaniji, a shareholder of "Close Up Ltd." was denied inspection of the Shareholders registration book by the Company because it had closed inspection for 40 days (Jan 01, 2004 to Feb. 09, 2004) due to its impending AGM.

Is the Company's Action valid? Can a shareholder also demand copy of the registration book?

[June, 2004](5 Marks)

Answer:

Proviso clause of sub-section 4 of section 46 of Companies Act, 2063 provides that a public company may, by giving 7 days advance notice in a national newspaper, close inspection of the

registration book for a maximum period of 45 days in one year but not exceeding 30 days at a time. Hence the closure of registration book for a period of 40 days, and thus the denial of inspection to Gyaniji, by Close Up Ltd. is not legal.

Any person, if he so desires may, except when inspection is closed u/s 35 (4), receive a copy of the registration book upon payment of the prescribed fee Section 35 (5).

Question No. 132:

Board of Directors of Rara Lake Company Ltd. Having issued capital of 13 million rupees, have appointed Mr. R.K. Jain an Indian citizen as a company secretary on 2060.12.28. Examine the following:

a) Will the appointment of Mr. R.K. Jain is valid?
b) Would you answer be different if, issued capital of Company is 8 million rupees?

[June 2004](5 Marks)

Answer:

Section 185 of Companies Act, 2063 prescribes about the appointment of company secretary as follows:

1) A public company with the paid –up capital of ten million rupees or more shall appoint to the post of company secretary a Nepalese citizen who has the qualification mentioned in Sub-section (2).
2) A Nepalese citizen who has worked in the related field for at least two years after obtaining the professional certificate of company secretary issued by a native or foreign body authorized to issue the professional certificate of company secretary pursuant to the prevailing law or who has worked in the related field or in the field of company management for at least three years after doing at least bachelor degree in law, management ,commerce or economics may be appointed to the post of company secretary.

   Provided, however, that this provision shall not apply to the company secretary who is incumbent at the time of commencement of this Act for three years after the date of commencement of this Act.
3) No director of the concerned company shall be eligible to be appointed as the company secretary of such company.
4) A person shall not be appointed to the post of company secretary of more than one company at the same time.

   Provided, however, that this provision shall not bar the appointing of the company secretary of any principal company to the post of company secretary of the subsidiary company of such company.
5) Where it is provided by this Act, the prevailing law or articles of association that any act has to be done by or through the company secretary, and the post of company secretary remains vacant in the company or any reason the incumbent company secretary fails to do such act or shows has inability to do such act, then any such employee of the company, who has the

qualification referred to in this Act, as designated by the board of directors to do such act may perform such act in the capacity of company secretary.

In the given case:

i) Appointment of Mr. R.K. Jain as company secretary is not valid being an Indian citizen.
ii) Appointment of company secretary is valid; since paid up capital of the company is less than ten million rupees hence it does not falls under the preview of section 185 of Companies Act, 2063.

Question No. 133:

M/s Pioner, a Public Limited Company having paid up capital of Rs. 15 million rupees. Due to severe financial condition, the Company has passed necessary resolution in general meeting on 1st of January 2006, to reduce its paid-up capital at least by 50% of the present capital. The Company seeks your legal advice on the following matters:

What legal steps are to be taken to reduce the capital?

(June, 2006) (3+5=8 Marks) [December, 2003] (5 Marks)

Answer:

As per section 57(1) of the Companies Act 2063, if a company intends to reduce its share capital, it may, by adopting a special resolution to that effect at its general meeting, reduce its share capital by obtaining approval of the Court and making necessary amendment to or alteration in the memorandum of association and articles of association, accordingly.

On receipt of approval of the Court pursuant to Sub-section, the company may reduce its share capital as follows:

a) By reducing the capital to such amount as has been paid up where calls for payment of amount on shares are not fully paid up,
b) By paying back any paid-up share capital,
c) By devaluating the face value of shares where the company has sustained a big loss or suffered a natural calamity.

However, a company which has already become insolvent in accordance with the prevailing law shall not reduce its capital pursuant to this Section.

Accordingly, M/s Pioner Limited, should pass a special resolution in the general meeting and reduce its share capital with prior approval from the court and necessary alterations should be made in Memorandum and Articles of Association, to reduce its paid up capital at least by 50% of the present capital of Rs. 15 million.

Question No. 134:

Shri Atari didn't pay share first call money within the stipulated time period. Outline the steps that the company should take to forfeit the shares allotted to Shri Atari. Can Shri Atari claim the money he has already paid against the shares allotted to him?

[December, 2003](5 Marks)

Answer:

Section 53 of Companies Act, 2063 prescribes about the forfeiture of shares as follows:

(1) An amount for a share shall be paid up within the period of a call made in accordance with the articles of association.

(2) In making a call pursuant to Sub-section (1), a company shall send every shareholder a written notice, in the prescribed format, specifying a time limit of at least thirty days and the installment payable by him/her, the place and time for payment. A public company shall also publish such notice, for at least **two** times, in a daily newspaper with national circulation.

(3) If a shareholder fails to pay the sum called and payable in respect of the share within the period as referred to in Sub-section(2), a notice shall be sent to the concerned shareholder, giving an additional period of three months after the date of expiration of that period, and specifying clearly that if payment is made within that period, it shall be accepted, along with interest at the prescribed rate and if that shareholder fails to make payment even within that period, his/her share shall be liable to be forfeited. In the case of a public company, such notice shall also be published in a daily newspaper with national circulation for at least three times. In the installment called is not paid even within the time-limit as mentioned in that notice, the company may forfeit all or the remaining shares after retaining the number of shares as fully paid up to the extent of the amount paid up on the shares in respect of which the company has given such notice or also to the extent of the amount of dividends, if any, attached in respect of such shares.

Provided; however, that where the company has already undergone liquidation or insolvency prior to the forfeiture of shares, any amount due and payable in respect of the shares liable to accordance with the prevailing law.

(4) Where any share is forfeited under Sub-section (3), the board of directors may refund the amount already paid up in respect of the share so forfeited & the amount equal to the dividends, if any attached in respect of such share, or issue the share to the extent covered by such amount; and where the amount is to be refunded, it has to be refunded within 3 months after the forfeiture of share.

(5) In the event of failure to make refund within three months pursuant to sub- section (4), interest chargeable on such amount after the expiration of that period shall also be paid.

(6) The shares forfeited under Sub-section (3) may be sold or otherwise disposed of in such manner as the board of directors may, subject to the articles of association, thinks fit.

(7) A company which has been making profits for a period of three consecutive years or more may, by a special resolution adopted at its general meeting determines that a call may not be

made in respect of certain portion of its share capital not called on except in the case of liquidation or insolvency of the company.

(8) After a special resolution has been adopted under Sub-section (6), a call may not be made on the amount of share capital that is yet to be called on as mentioned in that resolution except where the general meeting, by adopting another special resolution, decides to make such call and except in the case of liquidation or insolvency of the company.

In the given case, Shri Atari didn't pay the share first call money within the stipulated time. So, pursuant to section 53 of Companies Act 2063, the company should send a notice to Shri Atari asking him to pay the money with interest at prescribed rate within three months and clearly specifying that if he failed to pay within the time limit, his shares would be forfeited. This notice should also be published in a national level newspaper at least twice.

If the board of directors of the company decides to forfeit all his shares, then his total paid up share amount along with its dividend, if any, shall be refunded within 3 months of share forfeiture. Otherwise, if delayed, interest shall be paid for delayed period. Hence, in such case of entire shares forfeiture, he can claim the already paid amount from the company as above.

Question No. 135:

Mr. Abroad who holds 45% shares of a public company is unavailable for the next 6 months but the company is required to convene its Annual General Meeting within the next 2 months and approve its accounts. Advise the company.

[December, 2003](5 Marks)

Answer:

In order to convene Annual General Meeting, the company requires quorum. Section 73 of Companies Act, 2063 prescribes about quorum as follows:

(1) A quorum for the general meeting of a private company shall be as specified in the articles of association of such company.

(2) Unless the articles of association of a public company provides for a larger number for the quorum, no proceedings of the meeting of the public company shall be conducted unless at least three shareholders of the total shareholders, representing more than fifty per cent of the total number of allotted shares of that company, are present either in person or by proxy.

(3) Where a meeting cannot be held because of quorum as referred to in Sub-section (2), and the meeting is called next time by giving a notice of at least seven days, nothing shall prevent the holding of such a meeting if at least 3 shareholders, representing twenty five percent of the total number of allotted shares of the company, are present either in person or by proxy.

(4) Notwithstanding anything contained elsewhere in this Section, in the case of a company incorporated under the proviso to Sub-section (2), of Section 3 or a company incorporated under Sub-section (1) of Section 173, the presence of 3 shareholders as mentioned in Sub-section(2) or (3) shall not be mandatory.

In the given case, even the absence of Mr. Abroad holding 45% shares at the general meeting satisfies the quorum. Hence, the company can convene the AGM. However, at least 3 shareholders representing more than 50% of total allotted shares must be present in the AGM pursuant to section 73 of Companies Act, 2063.

Question No. 136:

Some of the Shareholders of Nepal Garments Ltd. are contemplating legal action against the Company and it's directors for not posting dividend warrants even though the Company declared a dividend of 35% on its equity shares two months ago. Examine the liability of the Company and its directors for the said non-compliance. Also examine whether any defense can be raised by them against the liability.

[December, 2003](5 Marks)

Answer:

According to Section 182 (1) of the Companies Act, 2063 dividends declared should be distributed to the shareholders within 45 days of its declaration. Sub-section 3 of Section 182 states that dividend shall be paid along with interest at the prescribed rate if the company fails to make payment as per Sub-section (1). Hence the company will be liable to pay dividend along with interest to the shareholders but there won't be any other liability on the Company and the directors under the Companies Act, 2063.

The Company and its directors can raise the following defense in case of prosecution:

i. The dividends couldn't be paid because of operation of law
ii. There is a dispute regarding the right to receive the dividends.
iii. For any other reason, the non-distribution within the time limit was not due to any default on the part of the company.

Question No. 137:

The Articles of Association of a Company states that a director shall not vote in respect of a contract in which he is interested. In a resolution put up for approval of the Shareholders, can a director exercise his voting right in favour of a contract in which he is interested?

[December, 2003](5 Marks)

Answer:

As per Section 70 (1) of the Companies Act, 2063, no shareholder shall be entitled to attend and vote in a General Meeting in his capacity as a shareholder, either in person or proxy, on discussion to be held in respect of any terms and conditions entered into or to be entered into between himself and the Company. Section 70 (2) prohibits a director or his partner from voting in General Meeting on any agreement/contract in which he is interested. As per sub-section (3), where any shareholder appoints a director of the concerned company as his/her proxy pursuant to Sub-section (2) of Section 71, such director shall not be entitled to vote in the general meeting, as a proxy of any one,

on any matter in which his/her interest or concern is involved or on the matter of his/her appointment.

Hence, the director can participate but cannot vote either as a director or as a proxy of other shareholder in a resolution put up for the approval of the shareholders in a General Meeting in favour of a contract in which he is interested

Question No. 138:

Rumours have flooded the public domain that the Directors of Fraudulent Traders Ltd. have grossly mismanaged the Company, defrauded the creditors and benefited them personally. What should the Registrar of Companies do to discover the truth?

[December, 2003](5 Marks)

Answer:

Chapter 9 of Companies Act, 2063 prescribes about the power of the Office of Company Registrar to call for explanation and investigation. Section 120 of Companies Act, 2063 gives powers to the Office of Company Registrar to call for explanation as follows:

1) Where any matter is unclear in the documents submitted by a company, and such matter has to be set out or any explanation is necessary in respect of any matter, the Office may call on the company to furnish explanation on such matter within such reasonable period of time as specified by it.
2) The management of the company shall, within the specified period of time, send proper replies the specified period of time, sent proper replies to the matters with respect to which explanation has been called on pursuant to Sub-section(1).
3) If, in the course of perusing explanation, the Office notices any irregularity in the business of a company, it may give necessary directive to the company to regularize, or cause to be regularized, it, and it shall be the duty of the company to obey such directive.

Further, section 121 of the Companies Act 2063 provides the office of company registrar the power to appoint inspector as follows:

1) If the shareholders representing not less than ten percent of the paid up capital or not less than one –fourth of the total number of shareholders of the company or the concerning creditors make an application, accompanied by the supporting evidence and reasonable grounds, stating that the company has acted in contravention of this Act, the memorandum of association, articles of association, prospectus, consensus agreement or prevailing law, the Office may, as per necessity, depute one or more inspectors. Such inspector shall be an expert in any of the subjects viz. accounts, law, finance, management, commerce, industry or company administration or any business which a company carries on the applicant shall deposit with the Office such amount of estimated cost required for such investigation as specified by the Office.
2) Notwithstanding anything contained in Sub-section (1),where the Office is of opinion that the following circumstance does exist ,it may, as per necessity, even if no application is made pursuant to Sub-section (1), appoint an inspector in possession of the qualification referred to in Sub-section (1) ,to investigate the transactions or business of any company:

b) on the receipt of information that the business or transaction of the company is being carried on to defraud the shareholders or creditors of the company or otherwise for a fraudulent or illegal purpose or it is carrying out acts against public interest; or
c) any public company has not furnished such information about its transactions as is required to be furnished.

Thus, the Office of Company Registrar can call for explanation and also appoint inspectors to investigate the transactions of Fraudulent Traders Pvt. Ltd. and discover the true state of affairs.

CHAPTER-3

SECURITIES ACT, 2063 AND RULES

[Note: All answers suggested hereby have been updated as per Securities Act, 2063]

Question No.1:

Salme Hydropower Limited has issued IPO to the public on 22 September 2022 and listed in NEPSE on 02 October 2022. As per Security Registration and Issues Regulation, 2073 all listed companies have to published quarterly report in daily national newspaper and one copy of such report with signature shall submit to SEBON and NEPSE. State the contents that have to be mentioned in quarterly report as per the rules. **(December 2022) (7 Marks)**

Answer:

Each listed company shall publish quarterly report in the national media and also should load the data in the NEPSE & SEBON online system so that each stakeholder should have knowledge on the company and its progress and current status. Following contents should be required to make the quarterly report for the publication for a listed company as per the schedule 14 of the Security Registration and Issue Regulation, 2073:

i) Financial statement:
- Quarterly financial statement including the balance sheet, profit or loss account and the quarterly financial statement should be comparable with the previous year same quarter financial statement. This financial statement should be based on the provisional financial statement and should be prepared considering all possible facts and figures in every quarter and the figures should be comparable in each quarter so that the investor can analyses the financial information as per their requirement.
- Along with the financial report, a details of number of shares hold by the related parties of the company is also shown in the report. Related parties including their name and share holding along with their ratio of holding also be mentioned in this report.
- There should also include the financial ratio like earning per share, PE ratio, net worth per share, return on assets and return on equity

ii) Management Analysis
- Management shall include the current status of the company saying whether the company has started commercial operation or will start within the date or any further analysis of the company should be mentioned in this section.

iii) Legal proceeding:
- The report should also disclose whether there is any legal case regarding. All legal cases and litigation should be disclosed in this report.

Question No. 2:

Zink limited is a listed company and is planning to increase the capital so that it can expand its business in all over Nepal. However, the board is unaware how to increase the capital and ask

you as a consultant to advise them the process to increase the share capital. You offer them to go in Further Public Offering (FPO) process to increase more capital for the company. Advise them the conditions and process of the FPO referring the Security Board's Securities Registration and Issue Regulation, 2073. **(June 2022) (5 Marks)**

Answer:

Rule 14 of Securities Registration and Issue Regulation, 2073 has mentioned the further public offering (FPO) system and procedures as follows:

1) A public company who has already issued initial public offering (IPO) and who has already listed in the stock market shall issue further public offering (FPO) to increase the share capital.
2) The public company who wants to increase the share applying the FPO shall have to fulfill the following conditions:
    a. The company has net profit at least for three latest years out of the total five years its operation and its net worth per share is higher than the paid up capital.
    b. The public company has completed at least three years after the initial public offering (IPO).
    c. Shareholders have approved the FPO agenda in the annual general meeting of the public company.
    d. If the public company wants to issue FPO in the higher rate than the face value of the share shall have to follow the complete procedures of the FPO calculation and the public company shall have to justify the new higher rate with the different ways as mentioned in the procedures.
3) The public company who is interested to FPO has to get the approval from the Security Board of Nepal and the public company after the approval has to publish the prospectus to the public for FPO as prescribed.

Question No. 3:

Mr. Z, one of the directors of PQR Ltd., passes some secret information as to the financial positions and future merger plan of the company to his relative Y. On the basis of that secret information Y bought huge number of shares of that company. Few months later when the financial position published share price went up and Y earns huge amount of money from the transaction of that share. Did Mr. Z commit any crime under the Securities Act? If yes, what crime did he commit? and what punishment to be imposed on him? Answer on the basis of Securities Act, 2063.

(December 2021) (5 Marks)

Answer:

Yes, Mr. Z committed a crime against Securities Act, 2063. His activities are known as insider trading and it is a punishable crime under Nepalese law. Section 91 of the Securities Act, 2063 states that 'in case any person conducts or causes others to conduct transactions in securities on the basis of any inside information or report which has not been made public and which can have an impact on the value of the securities, or supplies any such information or report possessed by him to any other person, except in the course of discharging his duties, he shall be deemed to have carried out an insider trading of securities.'

Regarding the punishment, any insider who deals in securities in contravention of section 91 of the Act, under section 101(1) of the Act he shall be punished with a fine equal to the amount involved in the offence or with imprisonment for a term not exceeding one year or with both.

Question No. 4:

A complaint has been received in the Securities Board requiring action against Julum Singh as he has been alleged to have committed an offence of affecting stock exchange. Answer the following questions pursuant to the Securities Act, 2063:

What do you mean by an offence 'Affecting Stock Exchange'?

How is the case investigated and prosecuted against Julum Singh for this offense?

What punishment could he be imposed if he is convicted?

(June, 2021) (10 marks)

Answer:

i) Pursuant to section 96 of the Securities Act, 2063, "To affect stock exchange or Affecting Stock Exchange" means:

If a person individually or in association with others commits any of the following acts to affect directly or indirectly the transaction in securities, such a person shall be deemed to have affected the stock exchange:

(a) To increase the market price of securities issued by any company with the intent to encourage others to purchase or sell the securities or to avoid the purchase or sale of such securities,

(b) To decrease the market price of securities issued by any company with the intent to encourage others to purchase or sell the securities or to avoid the purchase or sale of such securities,

(c) To stabilize the market price of securities issued by any company with the intent to encourage others to purchase or sell the securities or avoid the purchase or sale of such securities.

ii) The case relating to the offense of Affecting Stock Exchange under section 96 of the Securities Act, 2063 shall be state cases to which Government of Nepal shall be a plaintiff pursuant to section 102 of the Act, 2063.

Section 103 of thie Act provides for investigation and prosecution of a case against the accused of this offense as under:

(1) If a complaint is made by any one that anyone (in this case Julum Singh) has committed the offense referred to in Section 96 of the Act, the Securities Board may designate any officer as an investigating authority to conduct investigations of the case relating to such an offense.

(2) The investigating authority designated pursuant to Sub-section (1) above shall conduct investigations as prescribed in relation to such an offense and file a case in the concerned District Court within thirty five days after the date of completion of investigations.

(3) The investigating authority designated pursuant to Sub-section (1) above may, in the course of conducting investigation, make necessary inquiry with, take depositions of, any person or body related with the offense or demand necessary documents, statements and records from such person or body.

(4) The designated investigating authority shall, in conducting investigation of and filing a case pursuant to this Section, shall obtain advice of the government attorney.

Pursuant to section 104 of this Act, investigation may be conducted upon holding in detention or suspension or release on bail as necessary:

Notwithstanding anything contained in the prevailing laws, if, in conducting investigation of the case held to be an offense referred to in this Act, there is a reasonable ground to believe that any person against whom action is being taken on the accusation of an offense referred to in this Act may abscond and disappear or it appears that there is any loss of or damage to any assets, the Securities Board may require such a person to furnish necessary bail or guarantee of asset and may hold such a person in custody in the event of failure to furnish such bail or guarantee.

iii) The convict Julum Singh, who has committed the offense of Affecting Stock Exchange under Section 96 of the Securities Act, 2063 shall be liable to the punishment with a fine of fifty thousand rupees to one hundred thousand rupees or with imprisonment for a term not exceeding one year or with both punishments, and where anyone has suffered any loss or damage from such an act, such loss or damage has also to be recovered.

As to the payability of compensation, section 105 of this Act categorically states that if anyone has sustained any loss or damage by the reason of effect in the price of securities purchased or sold by any one as a result of the commission of an offense punishable under this Chapter, such loss and damage may also be recovered or realized from the offender of such offense.

Question No. 5:

Mr. B. B. Karki is master degree holder and having more than seven years of experience in corporate and other laws. He has been nominated for the member of Nepal Securities Board. He holds other qualifications for being a member of the Board. However, other member has allegation that he has been suffering from lack of competence. So, there is a demand of his removal. State the qualifications, disqualifications and grounds of removal of the member of Nepal Securities Board and justify the logic of his removal quoting the provisions of the Securities Act, 2063.

(Dec, 2020) (8 marks)

Answer:

Section 10 of the Securities Act, 2063 has prescribed the qualifications of a Chairperson or a member of the Nepal Securities Board as follows:

(a) One who is a citizen of Nepal,

(b) One who has maintained high moral character,

(c) One who has gained at least seven years of professional Experience in the field of stock exchange, management, capital market development, economics, finance, commerce, management or law, and

(d) One who is not disqualified under Section 11 of this Act.

Any of the following person shall not be eligible to be appointed to the office of Chairperson or member, as the case may be:-

(a) One who is an officer-bearer of a political party,

(b) A person involved in securities business,

(c) One who is adjudicated as an insolvent,

(d) One who is insane,

(e) One who has been convicted by the court of an offense involving moral turpitude.

Section 12 (1) has provided the circumstances on which a Chairperson and a member may be removed from office: Where there occurs a circumstance for removal of the Chairperson or the member referred to in sub section (2), the Government of Nepal shall remove the Chairperson and member, as the case may be. Provided that prior to making such a removal, the Government of Nepal shall not deprive the concerned person of a reasonable opportunity to defend him/herself.

The Chairperson and the member, as the case may be, shall be removed from the office in any of the following circumstances pursuant to section 12 (2) of this Act:-

(a) If one is disqualified to be a Chairperson and a member, as the case may be, pursuant to Section 11 above,

(b) If one commits any act contrary to the interest of investors in securities or any act that may cause loss or damage to the development of capital market,

(c) If one suffers from lack of competence to implement, or cause to be implemented, such functions required to be performed by the Board to attain the objectives of the Board pursuant to this Act or the Rules framed under this Act,

(d) If one has been held disqualified to carry on any occupation or business by the reason of misconduct and his or her certificate has been revoked or he or she has thus been restricted to carry on a business,

(e) If one remains absent from three consecutive meetings of the Board without giving a notice.

Mr BB Karki has been alleged that he has lack of competency and claimed to be removed from the office. There is a ground of removal on the circumstances of lack of competence. However, he has to be given reasonable opportunity to defend himself. It should be proved no doubt that he is suffering from incompetence. If he is suffering from such circumstances then he could be removed from the office of the member of Board.

Question No. 6 :

Ganesh Regmi, an employee of Investment Company is convicted for an offence of insider trading after investigation, and, he has to be imposed punishment against it by the Securities Board. Answer the following pursuant to the Securities Act, 2063:

i) What is insider trading?
ii) What persons are likely to be involved in insider trading?
iii) What is the range of punishment the Securities Board could impose against him?

(Dec, 2019) (2+3+2=7 marks)

Answer:

i) Insider trading has been defined by Section 91(1) of the Securities Act, 2063 as under:

If any person deals in securities or causes any other person to deal in securities on the basis of any insider information or notice that are unpublished or communicates any information or notice known to such a person in the course of the discharge of his duties in a manner likely to affect the price of securities such a person shall be deemed to have been committed an insider trading in securities.

Pursuant to explanation to Section 91(1) of the Securities Act, 2063 "insider information" means any such specific kind of information or notice not published by a body corporate issuing any securities as may be capable of affecting the price of such securities if such information or notice is disclosed.

ii) Section 92 of the Securities Act, 2063 identifies the persons likely to be involved in insider trading as under:

For the purposes of this Act, the following persons shall be deemed to be those who have access to the insider information or notice not published by anybody corporate:

(a) A director, employee or a person, who can obtain any information or a notice in the capacity of a shareholder of that body corporate,

(b) A person who can obtain any information or a notice in the capacity of a professional service provider to that body corporate.

(c) A person who can obtain any information or a notice having a direct or indirect contact with the person of source as specified in Clauses (a) and (b) above.

iii) Ganesh Regmi, an employee of Investment Public Company who commits an insider trading as referred to in Section 91 above, shall, upon being convicted of the offense of insider trading, be liable to the punishment with a fine equal to the amount in controversy or with imprisonment for a term not exceeding one year or with both punishments pursuant to Section 101(1) of the Securities Act, 2063.

Question No. 7:

Securities Act, 2063 has been enacted with a view to regulate and manage the activities of the securities markets and persons involved in the business of dealing in securities by regulating the issuance, purchase, sale and exchange of securities for the purpose of protecting the interests of investors in the securities. State how a body corporate issues securities under the Act.

[Dec, 2019) (5 marks) (June, 2019) (7 Marks)

Answer:

The body corporate will issue its securities under the Act as follows:

Under section 27(1) a body corporate shall have to register securities to be issued by it with the Board prior to their issuance. For this a body corporate shall have to make an application in the prescribed format, accompanied by its memorandum of association, articles of association, documents related with such securities, and the prescribed fees, to the Board for registering securities pursuant to Sub-section (1).

Where an application is received the board shall make necessary inquiry into the matter and, if it considers appropriate to register such securities, register such securities in the register as prescribed, indicating the details of such securities and issue the securities registration certificate in the prescribed format to the concerned body corporate.

Under section 28 where a body corporate allots or sells securities after registering such securities, the body corporate shall have to give a notice along with the details of securities so allotted or sold to the Board within seven days.

Upon receipt of a notice as referred as above, where it appears necessary to make the allotment and sale of such securities fair and informative for the interests of investors and the body corporate, the Board may give necessary directive to the concerned body corporate. It shall be the duty of the concerned body corporate to abide by such directive.

Under section 29 where a body corporate is to sell and distribute securities to more than fifty persons at a time, it shall make public issue for the sale and distribution of such securities. The

period to be open for making application of the securities to be issued as above shall be as prescribed. The provisions relating to the value and allotment of securities for which public issue has to be made shall be as prescribed.

Where securities for which public issue has been made once could not be sold and have to be re-issued again within one year, the body corporate which so issues the securities may, with the approval of the Board, issue such securities by mentioning the matters which are different than the matters set forth in the previously published prospectus and the prospectus previously published.

Under section 30 a body corporate shall have to get a prospectus approved by the Board for making public issue of securities in accordance with this Act and publish the prospectus for information to all the concerned. While publishing the prospectus in such a way, the prospectus shall also mention the place where the general public can obtain or inspect the prospectus.

However, it is not required to issue a prospectus in the following securities:

(a) Securities issued by Nepal Rastra Bank,
(b) Securities issued against the full guarantee of the Government of Nepal,
(c) Securities proposed to be sold to up to fifty persons at a time,
(d) Securities issued to own workers or employees,
(e) Securities permitted by the Board as to issue and sell without issuing a prospectus.

Under section 31 The Board shall approve only a prospectus which contains such information as may be adequate for investors to make evaluation as to the assets and liabilities, financial status, profit and loss of the issuer and matters expected in future.

Under section 34 Everybody corporate issuing securities shall provide information on the following matters to the Board and its shareholders as soon as possible:

(a) Such matters as may be necessary and supportive to evaluate its financial condition

(b) Such information as may be capable of affecting the transaction of stock exchanges or the value of securities.

(2) Every body corporate issuing securities shall also provide the Board and its shareholders with the notice and information as prescribed, in addition to the above matters

Question No. 8:

A banking company, named 'B' took approval from the Securities Board of Nepal (SEBON) to issue the FPO of its three lakh shares at the rate of Rs. 250 per unit. Immediately, after the approval obtained, 'B' appointed 'C' as the underwriter to sale the shares, hence, 'B' and 'C' entered into an agreement. Accordingly, the underwriter initiated the process to sell the shares, but only two lakh shares were sold during the process. The Underwriter sold the unsold shares without bringing them under his ownership. An application was filed by 'B' to the SEBON against the activities of 'C'. SEBON appointed you as a legal consultant to provide legal advice on the following issues. Advise SEBON to the following issues in the light of the Securities Act, 2063.

1) What legal rights and duties are available to the Underwriter? Whether the Underwriter can sale such unsold shares to others without bringing them under his ownership?

2) Is there any fine and punishment prescribed by the Securities Act against the defaulting Underwriter? If yes, what is the amount of fine and punishment?

[December, 2018](10 Marks)

Answer:

Once the underwriting agreement is struck, the underwriter bears the risk of being unable to sell the underlying Securities, and the cost of holding them on its books until such time in the future that may be favorably sold. The issuer may agree to make the underwriter the exclusive agent for the initial sale of the Securities. That is, even though third party buyers might approach the issuer directly to buy, the issuer agrees to sell exclusively through the underwriter. The right regarding commission of underwriter and its obligation for unsubscribed shares are generally mentioned in the agreement between the issuer of Securities and the underwriter company, underwriting agreement exposes the underwriter to substantial amount of risk. The Securities issuer gets cash up from, access to the contracts and sales channels of the underwriter, and is insulated from the market risk of being unable to sell the Securities at a good price. Similarly, the underwriter gets a profit from the markup, plus possibility an exclusive sales agreement. When underwriting agreement is concluded it is the duty of the underwriter to take all the unsold shares in his ownership. The underwriter cannot sale the shares to the other without taking the same in its ownership. The underwriter is entitled to get commission as settled between them. If underwriters violate this it is unlawful.

Question No. 9:

Securities business person after making a contract of purchase or sale or exchange of securities has to keep a record of the contract by making a contract note as per Section 77 of the Securities Act, 2063. State the particulars to be mentioned in the contract note and distribution of the same.

[June 2018](7 Marks)

Answer:

As per Section 77 of Securities Act 2063, following particulars shall be included in the contract note:

1) Provisions relating to obtaining the identification of the concerned investor, opening a customer account, making transaction of money and concluding an agreement relating to transactions by any securities business person prior to carrying on the securities business shall be as prescribed.
2) Any securities business person shall, upon making a contract on the purchase, sale or exchange of securities, make a contract note before the closing of market on the following day, and where the securities business person has made such a contract as an agent, the original copy of the contract note shall be delivered to the concerned customer and where such person has made such a contract for himself, such a person shall mention that matter in the contract note and retain the note with him.
3) The contract note referred to in Sub-section (2) shall contain, inter alia, the following matters:-

a) Type of securities business and place where such business is operated,
b) Where the securities business person him/herself has acted as the principal, details thereof,
c) Name and address of the person to whom the contract note is given,
d) Date of the contract and date on which the contract note is prepared,
e) Description and quantity of securities,
f) Per unit value of securities,
g) Description relating to consideration payable under the contract,
h) Amount or rate of commission payable under the contract,
i) If any fee is chargeable, the rate of such fee and description pertaining thereto,
j) Day on which account is settled or cleared
k) Such other matters as prescribed

Question No. 10:

What are the various circumstances when the Board may suspend or cancel the license of the Stock Exchange? Is there any exception, not to provide reasonable opportunity of being heard to the concerned Stock Exchange before cancellation of the license? Explain with reference to the provisions of the Securities Exchange Act 2040.

[June, 2006](5 Marks) [December 2017](7 Marks)

Answer:

Section 88 of Securities Act, 2063 prescribes about the suspension of license of the stock exchange as follows:

1) If any stock exchange or securities business person does any act in contravention of this Act or the rules and bye-laws framed under this Act or does not observe any order or direction issued by the Board or does not perform activities required to be performed by it, the Board may, having regard to the interest of investors, suspend the license obtained by such a stock exchange or securities business person to operate the stock exchange or securities business specifying a certain period.
2) No suspension of license made pursuant to sub-section (1) shall have any effect on any liabilities arising from any activities done by such a stock exchange or securities business person prior to the suspension of a license.

Similarly, section 89 of Securities Act, 2063 prescribes about the cancellation of license as follows:
The Board may, on any of the following circumstances, revoke a license obtained by any stock exchange or securities business person to operate the stock exchange or securities business under this Act:-

a) If one stops operating the stock exchange or securities business,
b) If one operate the stock exchange or securities business in contrary to the interest of investors,
c) If one violates the terms set forth in the license,
d) If one violates this Act or the rules and bye-laws framed under this Act,

e) If one fails to observe any order or direction issued by the Board,
f) If one becomes insolvent being unable to repay credit to creditors,
g) If the company or body having obtained a license to operate the stock exchange or securities business is wound up,
h) If the stock exchange or securities business person having obtained a license to operate the stock exchange or securities business makes an application for the revocation of a license,
i) If the securities business person who has removed an agent appointed by it does not appoint another agent in lieu of such an agent,
j) If one fails to submit such financial and transaction related statements as required to be submitted to the Board,
k) If one fails to pay such fees as required to be paid pursuant to Section 50 to the Board within the time limit specified by such a Section.
a) No revocation of a license made pursuant to sub-section (1) shall have any effect on any liabilities arising from any activities done by such a stock exchange or securities business person prior to the cancellation of license.

Yes, there is one exception i.e. if an application is submitted by the Stock Exchange itself for cancellation of its license, then reasonable opportunity of being heard need not be provided before cancellation of license of Stock Exchange by the Board.

Question No. 11:

Thakurlal Shrestha, a computer operator received an article from Samjhana Insurance Co. Ltd. to be published by next day while editing news for Economic Times. It was related to the financial forecast future strength of the company as it is about to acquire Dunhill Insurance, U.K. At the same day, he purchased 10000 No. of shares of Samjhana Insurance Co. @ NRs. 300 per share believing that the news might affect the price of share and he could earn profit. When the news published by next day, the share of the company increased, hence, he succeeds to sell these shares @ NRs. 600 per share with earnings of NRs. 300 per share. A case is filed against him for the commission of an offence of insider trading. Decide with the relevant provisions of the Securities Act, 2063.

i) Whether Thakurlal Shrestha committed an offence of insider trading.
ii) State the punishment to be imposed in an offence of insider trading

[June 2017](5+5=10 Marks)

Answer (i):

Pursuant to Section 91 of the Securities Act, 2063, it is illegal share trading by employees of a company where they have used confidential price-sensitive information for their own gain or the gain of their associates. It is a trading in securities whilst in possession of price-sensitive information which is not available to the person with whom one is contracting or to other participants in the securities in the market at the relevant time.

The following dealings are generally called as insider trading and are prohibited:

a) Dealing of price-affected securities as an agent or principal
b) Procuring directly or indirectly the acquisition or disposal of securities by any other person.
c) Encouraging another person to deal in the price-affected securities.
d) Disclosing the information otherwise than in the proper performance of the functions of his employment, office or profession to another person.

In this case, Thakurlal Shrestha therefore, has committed an offence of insider trading who has obtained insider information in the proper performance of the functions of his employment pursuant to sections 91 and 92 of the Securities Act, 2063. Similarly, the computer operator as an employee of Economic Times has obtained the price affecting information and had misappropriated information belonging to his employer the insurance Co. which he should not use for his own benefits.

Answer (ii):

Sections 91 and 94 to 100 of the Securities Act, 2063 have explained various types of offences for insider trading and Section 101 of the said act has mentioned various punishments as follows:

a) A person who commits an insider trading as referred to in Section 91 shall, upon being convicted of the offense of insider trading, be liable to the punishment with a fine equal to the amount in controversy or with imprisonment for a term not exceeding one year or with both punishments.
b) A person who commits any act referred to in Section 94, 95, and 96 will be liable to the punishment with a fine of fifty thousand rupees to one hundred thousand or with imprisonment for a term not exceeding one year or with both punishments, and the loss or damage caused if any to be recovered.
c) A person who commits any act referred to in Section 97, 98, 99 and 100 will be liable to the punishment with a fine of one hundred thousand to three hundred thousand rupees or with imprisonment for a term not exceeding two year or with both punishments, and the loss or damage caused if any to be recovered.
d) If a person knowingly or with mala fide submits or prepare statement of accounts or books will be liable to the punishment with a fine of fifty thousand rupees to two hundred thousand rupees.
e) A person may be fined rupees fifty thousand rupees to two hundred thousand rupees and the compensation thereof for loss, for the act done in contravention to the Act or Rules or Bye-laws.
f) A person may be fined rupees fifty thousand rupees to one hundred thousand rupees for issuing securities, carrying stock exchange without fulfilling such requirements as required as per the Act or Rules or Bye-laws.
g) A person who violates the Act or Rules or Bye-laws. Framed thereof may be fined rupees twenty five thousand rupees to seventy five thousand rupees.

Question No. 12:

Zee Securities (P) Ltd. has received license to operate securities business from the Security Board of Nepal. The securities business company (Zee Securities (P) Ltd) has to follow certain prescribed standards as defined in Securities Act. What are these standards? Explain.

[December, 2016](8 Marks)

Answer:

Section 76 of Securities Act, 2063 has explained the provisions relating to business standards for securities business person as follows:

All securities business person shall in carrying on the securities business, observe the following business principles:

a) to maintain the operation of securities business fair and of high standards,
b) to carry on the securities business with proper skills, care and hardworking,
c) to keep on the higher standard of stock exchanges,
d) to obtain information from customers as to their objective to make investment and provide services accordingly.
e) to provide such information and advice as may be required for the customers to make decision on investment in securities.
f) to avoid conflicts of own interests with the interest of customers and, in the event of the existence of such situation, to disclose that matter to customers and carryon the securities business having regard to the interest of customers.
g) to make such provision as may be necessary to fulfill commitments made in relation to the securities business
h) to properly maintain records relating to the securities business,
i) to provide for necessary training to employees in order to prepare skilled human resources for the operation of the securities business.
j) to observe such other principle as prescribed in relation to the operation of the securities business.

Question No. 13:

Securities Act, 2063 provides for establishment of a compensation fund to protect interest of the investors from a possible loss or damage. Mention about such fund and it's operation.

[June, 2016](5 Marks)

Answer:

Sections 53, 54 and 55 of the Securities Act, 2063 provide for stock exchange to establish a compensation fund and operation of such fund:

Section 53: provides the following:

(1) Stock exchange shall establish and operate a compensation fund as may be prescribed by the Board in order to protect investors against possible loss or damage.

(2) The funds deposited to the fund referred to above shall be used to bear compensation as prescribed.

Section 54 provides for the operation of the fund as follows:

The following provisions shall be made in the Rules in relation to the operation of the compensation fund to be established pursuant to Section 53 or 55:

a. Provisions relating to the deposit of money to the fund;
b. Maximum amount to be paid as a compensation from the fund;
c. Provisions relating to the accounts and audit of the fund;
d. Conditions for making claim to obtain amount from the compensation fund and procedures from making such a claim;
e. Conditions where any claim cannot be made on the compensation fund;
f. Procedures for taking action and making decision on payment of money as claimed from the compensation fund;
g. Maximum limit of amount payable as a compensation to one person;
h. Other necessary matters in relation to the examination of compensation claims;
i. Provisions to be made in the event of the revocation of the license of a stock exchange ; and
j. Other necessary provisions in relation to compensation.

Section 55 provides for the following:

If a stock exchange is not able to establish and operate the compensation fund pursuant to Section 53 in order to protect investors against possible loss and damage or does not pay or fails to pay the amount of compensation to be payable as prescribed, the Board may establish and operate the compensation fund as prescribed or make necessary provisions in relation to the payment of the amount of compensation required to be paid as prescribed.

Question No. 14:

Matela Stock Limited has obtained license as a security business person from Security Board of Nepal in 2070. However, the Company has not submitted audited account and statement for fiscal year 2070/71 till Phalgoon end 2071. Does the Board have power to take action on Matela Stock Limited of not submitting the audited account? Explain it referring Sections 82 and 101 of Securities Act, 2063.

[December, 2015](5 Marks)

Answer:

Section 82 of Securities Act, 2063 has explained the submission of account and statement by a security business person as follows:

1) A securities business person shall submit the audited profit and loss account, balance sheet and cash flow statement and other necessary financial statements clearly reflecting the operational affairs of securities business carried on in the preceding financial year to the Board and the concerned stock exchange within three months from the date on which such a fiscal year is expired.

2) If a securities business person fails to submit the accounts and statements pursuant to Sub-section (1) and makes an application, accompanied by the reasonable grounds for such failure, to the Board for the extension of time limit, the Board may extend the time limit for a period not exceeding three months. In the event of failure to submit such accounts and statements even within the period of time limit so extended, the Board may fine such securities business person with a sum of five thousand to twenty five thousand rupees.
3) Notwithstanding anything contained in Sub-section (1) or (2), a securities business person who is not able to submit accounts and statements by the reason of not having them audited within the time may submit un-audited accounts and statements on the condition of submission of actual accounts and statements audited subsequently.

Section 101 has defined various types of punishments whereas sub section 4 explained such type penalty i.e. non submission of financial statement to the board by the security business persons as follows:

If any one knowingly or with mala fide intention, does not maintain, make, prepare or submit such accounts, books, statements, reports, notices, information or similar other documents as required to be maintained, made, prepared or submitted under this Act or the Rules or Bye-laws framed under this Act within the time specified for the maintenance, making preparation or submission of such accounts, books, statements, reports, notices or information or if one makes, prepares or retains false statements or documents, the Board may punish such a person with a fine of fifty thousand rupees to two hundred thousand rupees.

Question No. 15:

Chatur Poudel, a director of Kahare Agro-Products Limited has been charged off insider trading in securities. An investigating authority appointed by Nepal Securities Board has filed a charge-sheet (law suit) against him for the offence of insider trading in securities in Kathmandu District Court. The case is sub-judice.

Now, based on the above fact, answer the following questions in the light of Securities Act, 2063:

i) What is insider trading in securities?
ii) What is insider information?
iii) Which persons are likely to be involved in insider trading?
iv) What amount of maximum punishment could be imposed against the accused Chatur Poudel if convicted by the court for the offence?

[December, 2014](5 Marks)

Answer:

Insider trading has been defined by section 91(1) of the Securities Act, 2063 as under:

If any person deals in securities or causes any other person to deal in securities on the basis of any insider information or notice that are unpublished or communicates any information or notice known to such a person in the course of the discharge of his or her duties in a manner likely to affect the price of securities such a person shall be deemed to have been committed an insider trading in securities.

Pursuant to section 91(1), Explanation of the Securities Act, 2007 "insider information" means any such specific kind of information or notice not published by a body corporate issuing any securities as may be capable of affecting the price of such securities if such information or notice is disclosed.
Section 92 of the Securities Act, 2007 identifies the persons likely to be involved in insider trading as under:
For the purposes of this Act, the following persons shall be deemed to be those who have access to the insider information or notice not published by any body corporate:

a) A director, employee or a person, who can obtain any information or a notice in the capacity of a shareholder of that body corporate,
b) A person who can obtain any information or a notice in the capacity of a professional service provider to that body corporate,
c) A person, who can obtain any information or a notice having a direct or indirect contact with the person or source as specified in Clauses (a) and (b) above.
   Chatur Poudel, a Director of Kahare Agro - product who commits an insider trading as referred to in Section 91 above shall, upon being convicted of the offense of insider trading, be liable to the punishment with a fine equal to the amount in controversy or with imprisonment for a term not exceeding one year or with both punishments pursuant to section 101(1) of the Securities Act, 2007.

Question No. 16:
Nepal Securities Board has recently issued a license to Smart Pvt. Ltd. to conduct business of dealing in securities. The company who obtained licence to conduct security business should have to maintain certain business standards. State what business standards must be complied with while conducting the business of dealing in securities pursuant to the Securities Act, 2063.

[December, 2013](5 Marks)

Answer:
Section 76 of the Securities Act, 2006 prescribes a set of Business standards. Accordingly, Securities business person shall, in carrying on the securities business, observe the following business principles:-

(a) To maintain the operation of securities business fair and of high standards,
(b) To carry on the securities business with proper skills, care and hard working,
(c) To keep on the higher standard of stock exchanges,
(d) To obtain information from customers as to their objective to make investment and provide services accordingly,
(e) To provide such information and advice as may be required for customers to make decision on investment in securities,
(f) To avoid conflicts of own interests with the interests of customers and, in the event of the existence of such situation, to disclose that matter to customers and carry on the securities business having regard to the interest of customers,

(g) To make such provisions as may be necessary to fulfill commitments made in relation to the securities business,
(h) To properly maintain records relating to the securities business,
(i) To provide for necessary training to employees in order to prepare skilled human resources for the operation of the securities business,
(j) To observe such other principle as prescribed in relation to the operation of the securities business.

Question No. 17:
Suppose, after the change of government, the staff of Nepal Securities Board office demanded the Government to remove the Chairperson of this Board, and the government said it would be according to law. State the circumstances on which the Chairperson of Nepal Securities Board may be removed from office by the Government of Nepal pursuant to the Securities Act, 2053.

[December, 2012](5 Marks)

Answer:
Section 12 of the Securities Act, 2053 provides the following circumstances on which a Chairperson of Nepal Securities Board may be removed from office:

1) Where there occurs a circumstance for removal of the Chairperson of this Board referred to in section 12(2) of this Act, the Government of Nepal shall remove the Chairperson, as the case may be.
   Provided that prior to making such a removal, the Government of Nepal shall not deprive the concerned person of a reasonable opportunity to defend him/herself.
2) The Chairperson, as the case may be, shall be removed from the office in any of the following circumstances:-
   a) If one is disqualified to be a Chairperson, as the case may be, pursuant to Section 11 of this Act (which sets disqualifications for this post),
   b) If one commits any act contrary to the interest of investors in securities or any act that may cause loss or damage to the development of capital market,
   c) If one suffers from lack of competence to implement, or cause to implement, such functions required to be performed by this Securities Board to attain its objectives pursuant to this Act or the Rules framed under this Act,
   d) If one has been held disqualified to carry on any occupation or business by the reason of misconduct and his or her certificate has been revoked or he or she has thus been restricted to carry on a business,
   e) If one remains absent from three consecutive meetings of this Board without giving a notice to it.

Question No. 18:
Stock broker and market maker.

[Final/December, 2012](5 Marks)

Answer:

A broker is an intermediary who has a license to buy and sell securities on a client's behalf. Stockbrokers coordinate contracts between buyers and sellers, usually for a commission. A market maker, on the other hand, is an intermediary that is willing and ready to buy and sell securities for a profitable price.

A broker makes money by bringing together securities' buyers and sellers. Brokers have the authorization and expertise to buy securities on an investor's behalf - not just anyone is allowed to walk into the New York Stock Exchange and purchase stocks; therefore, investors must hire licensed brokers to do this for them. A flat fee or percentage-based commission is given to the broker for carrying out a trade and finding the best price for a security. Because brokers are regulated and licensed, they have an obligation to act in the best interests of their clients. Many brokers can also offer advice on what stocks, mutual funds and other securities to buy. Due to the availability of internet-based automated stock brokering systems, clients often do not have any personal contact with their brokerage firms.

A market maker makes a profit by attempting to sell high and buy low. Market makers establish quotes whereby the bid price is set slightly lower than listed prices and the ask price is set slightly higher in order to earn a small margin. Market makers are useful because they are always ready to buy and sell as long as the investor is willing to pay a specific price. This helps to create liquidity and efficiency in the market. Market makers essentially act as wholesalers by buying and selling securities to satisfy the market; the prices they set reflect market supply and demand. When the demand for a security is low and supply is high, the price of the security will be low. If the demand is high and supply is low, the price of the security will be high. Market makers are obligated to sell and buy at the price and size they have quoted.

It is often the case that a market maker is also a broker. This can sometimes create the incentive for the broker to recommend securities for which he or she also makes a market. Therefore, investors should make sure that there is a clear separation between a broker and a market maker.

Question No. 19:

Clearing agent and merchant agent.

[Final/December, 2012](4 Marks)

Answer:

Clearing Agent:

Clearing agent refers to a person or company acting as an intermediary in a securities transaction. It also provides facilities for comparing data with respect to securities transactions. Clearing agent includes a custodian of securities in connection with the central handling of securities. Clearing agents are governed under Securities Exchange Act.

In Stander v. Financial Clearing & Services Corp, it was held that a clearing agent is generally under no fiduciary duty to the owners of securities that pass through its hands.

Merchant Agent:
One whose business it is to buy and sell merchandise; this applies to all persons who habitually trade in merchandise. In another sense, it signifies a person who owns ships, and trades, by means of them, with foreign nations, or with the different States; these are known by the name of shipping merchants.

Merchant agent is that person who represents the merchant and engages in a commercial pursuit. A commercial pursuit is one in which the thing pursued in a rupees in Nepalese context.

Question No. 20:
To regulate and manage the activities of the securities markets and persons involved in the business of dealing in securities by regulating the issuance, purchase, sale and exchange of securities for the purpose of protecting the interests of investors in securities, Securities Act, 2063 is enacted. Explain how a body corporate issues securities under the Act.

[June, 2012](5 Marks)

Answer:
The body corporate will issue its securities under the Act as follows:
Under section 27(1) a body corporate shall have to register securities to be issued by it with the Board prior to their issuance. For this a body corporate shall have to make an application in the prescribed format, accompanied by its memorandum of association, articles of association, documents related with such securities, and the prescribed fees, to the Board for registering securities pursuant to Sub-section (1).
Where an application is received the board shall make necessary inquiry into the matter and, if it considers appropriate to register such securities, register such securities in the register as prescribed, indicating the details of such securities and issue the securities registration certificate in the prescribed format to the concerned body corporate.
Under section 28 where a body corporate allots or sells securities after registering such securities, the body corporate shall have to give a notice along with the details of securities so allotted or sold to the Board within seven days.
Upon receipt of a notice as referred as above, where it appears necessary to make the allotment and sale of such securities fair and informative for the interests of investors and the body corporate, the Board may give necessary directive to the concerned body corporate. It shall be the duty of the concerned body corporate to abide by such directive.
Under section 29 where a body corporate is to sell and distribute securities to more than fifty persons at a time, it shall make public issue for the sale and distribution of such securities. The period to be open for making application of the securities to be issued as above shall be as prescribed. The provisions relating to the value and allotment of securities for which public issue has to be made shall be as prescribed.

Where securities for which public issue has been made once could not be sold and have to be re-issued again within one year, the body corporate which so issues the securities may, with the approval of the Board, issue such securities by mentioning the matters which are different than the matters set forth in the previously published prospectus and the prospectus previously published.
Under section 30 a body corporate shall have to get a prospectus approved by the Board for making public issue of securities in accordance with this Act and publish the prospectus for information to all the concerned. While publishing the prospectus in such a way, the prospectus shall also mention the place where the general public can obtain or inspect the prospectus.
However, it is not required to issue a prospectus in the following securities:
(a) Securities issued by Nepal Rastra Bank,
(b) Securities issued against the full guarantee of the Government of Nepal,
(c) Securities proposed to be sold to up to fifty persons at a time,
(d) Securities issued to own workers or employees,
(e) Securities permitted by the Board as to issue and sell without issuing a prospectus.
Under section 31 The Board shall approve only a prospectus which contains such information as may be adequate for investors to make evaluation as to the assets and liabilities, financial status, profit and loss of the issuer and matters expected in future.
Under section 34 Everybody corporate issuing securities shall provide information on the following matters to the Board and its shareholders as soon as possible:
(a) Such matters as may be necessary and supportive to evaluate its financial condition,
(b) Such information as may be capable of affecting the transaction of stock exchanges or the value of securities.
(2) Every body corporate issuing securities shall also provide the Board and its shareholders with the notice and information as prescribed, in addition to the above matters

Question No. 21:
"Insider trading means misuse of insider information or notice" elaborate referring the provisions of Securities Act, 2063. Also define its various forms.

[Final/December, 2011](5 Marks)

Answer:
Insider Trading and its various forms under Securities Act, 2006

Section 91 of Securities Act, 2006 defines Insider trading in securities as follows:
(1) If any person deals in securities or causes any other person to deal in securities on the basis of any insider information or notice that are unpublished or communicates any information or notice known to such a person in the course of the discharge of his or her duties in a manner likely to affect the price of securities such a person shall be deemed to have been committed an insider trading in securities.
Explanation: For the purposes of this Sub-section, "insider information or notice" means any such specific kind of information or notice not published by a body corporate issuing any

securities as may be capable of affecting the price of such securities if such information or notice is disclosed.

(2) Notwithstanding anything contained in Sub-section (1), any transactions already carried on shall not be deemed to be affected at all merely by the reason that an insider trading has been committed.

Section 92: Persons likely to be involved in insider trading:

For the purposes of this Act, the following persons shall be deemed to be those who have access to the insider information or notice not published by any body corporate:

(a) A director, employee or a person, who can obtain any information or a notice in the capacity of a shareholder of that body corporate,

(b) A person who can obtain any information or a notice in the capacity of a professional service provider to that body corporate,

(c) A person who can obtain any information or a notice having a direct or indirect contact with the person or source as specified in Clauses (a) and (b).

Section 93: Information or notice deemed to have been made public:

On any of the following conditions, any information or notice shall be deemed to have been made public:

(a) If any matter has been published with intent to inform the investors and their business advisers in accordance with the By-laws of a stock exchange,

(b) If there is a provision made under the law that the general public can see an information or a notice contained in any records,

(c) If there is a provision that any person desiring to deal in securities is escorted to the business room of a stock exchange so that such a person can know such an information or a notice,

(d) If there is a provision that any person desiring to obtain or see such information or notice or get a copy thereof can obtain and see the same

(e) If it has been communicated to any specific class, out of the general public,

(f) If there is a provision that information can be obtained only upon payment of fees or if such an information or a notice has been published outside Nepal.

The various forms of Insider Trading are:-

Section 94: False trading:

For the purposes of this Act, if the following trading is done, such a trading shall be deemed to ba fake or false trading:

(a) The actual ownership is not changed, even though the purchase or sale of securities is done directly or indirectly.

(b) An offer is made to purchase or sell securities on the line of same price upon knowing the price offered by another for sale or purchase.

Section 95: Fluctuation in price:
If an person causes stability, increase, decrease or frequent change in the price of securities by doing or causing to be done a fake or artificial or false trading, such a person shall be deemed to have caused fluctuation in price.

Section 96: To affect stock exchange:
If an person individually or in association with others commits any of the following acts to affect directly or indirectly the transaction in securities, such a person shall be deemed to have affected the stock exchange:
(a) To increase the market price of securities issued by any company with the intent to encourage others to purchase or sell the securities or to avoid the purchase or sale of such securities,
(b) To decrease the market price of securities issued by any company with the intent to encourage others to purchase or sell the securities or to avoid the purchase or sale of such securities,
(c) To stabilize the market price of securities issued by any company with the intent to encourage others to purchase or sell the securities or avoid the purchase or sale of such securities.

Section 97: To supply misleading statements:
If a person intentionally commits any of the following acts to insist others to purchase or sell securities, such a person shall be deemed to have committed an act of misleading:-
(a) To make or publish any statements or projection related statements with knowledge that such a statement is false, misleading or fake,
(b) To hide any fact or information with malafide intention,
(c) To make or publish a false or misleading statement, promise or projection with mala fide intention.

Section 98: Fraudulent transaction:
If a person intentionally commits the following transaction with intent to purchase, sell or exchange securities from, to or with any other person, such a person shall be deemed to have committed fraudulent transaction:-
(a) To make any technology, plan or commit any act to defraud others, or
(b) To get a person to do any act or be engaged in any work by misrepresenting such a person.

Section 99: Prohibition on transaction of securities by fraud or misrepresentation:
If a person knowingly induces to other to purchase or sale the securities or causes to be reduced, increased or stabilized the price of securities on the basis of statement that such a statement is false or misleading or that any statement has become or misleading by the reason that any matter is omitted from or hidden or not included in such a statement, such a person who does or causes to be done such act shall be deemed to have done transactions in securities by fraud or misrepresentation.
Committing an offence of Insider Trading is a Criminal and punishable offence.

Question No. 22:

What are the matters to be specified while giving application for license to carry securities dealing? **[Final/December, 2011](5 Marks)**

Answer:

Section 57 (2) of the Securities Act, 2063 enumerates the matters to be provided at the time of making an application to the board for carrying securities dealing business, which are as follows:

b. Type of securities business and services to be provided;
c. If an agent is to be appointed to carry on securities business and if such business is to be carried on in collaboration with others, matters pertaining there to;
d. In the case of those business persons, as prescribed, who are allowed to carry on business only upon obtaining a membership of a stock exchange, a recommendation letter of the concerned stock exchange; and
e. Grounds proving the ability to carry on the proposed securities business and such other information as may be specified by the board.

Question No. 23:

Nabraj Kunwar is a chief accountant of a commercial bank listed on the stock exchange. Whilst drawing up the annual accounts, Nabraj knows that the bank has made a better profit than expected. On the basis of that knowledge, he buys shares of the bank before the good results are announced. He makes a substantial profit on the share dealing. Nabraj also discloses the fact to his friend Dinesh Bharati before they are announced. Dinesh also buys shares of the bank. Whether Nabraj and Dinesh have committed any immoral act? Explain how these problems are tried to control under the prevailing law of Nepal? **[December, 2011](10 Marks)**

Answer:

The stock market value of shares in a company fluctuates according to the underlying performance of the company and the expectations of investors. Amongst other things, good company results will lead to an increase in the value of the shares. Since share prices fluctuate on the stock market, the possibility arises for individuals to make large profits, or losses, by speculating in shares. It can also provide people with the opportunity to take advantage of their close relationship with particular companies, in order to make profits from illegal share dealing. Such illegal trading in shares, known as insider trading, occurs when someone trades on the basis of price sensitive information before the general public has access to that information. Insider trading is illegal and restricted activity. It is a trading of securities by individuals with potential access to non-public information about the company, in breach of a fiduciary duties or other relationship. It is a violation of trust confidence or misappropriation of information. In other words insider dealing refers to the improper use of price sensitive information in respect of listed securities by a person for private gain. This principle has been adopted in the Companies Act, 2063 and Securities Act, 2063. Securities Act, 2063 Section 91 prescribes insider trading as if any person deals in securities or

causes any other person to deal in securities on the basis of any insider information or notice that are unpublished or communicates any information or notice known to such a person in the course of discharge of his or her duties in manner likely to affect the price of securities such a person shall be deemed to have been committed an insider trading in securities. It further explains that insider information or notice means any such specific kind of information or notice not published by a body corporate issuing any securities as may be capable of affecting the price of such securities if such information or notice is disclosed. Section 92 of the Act prescribes the provision regarding the persons likely to be involved in insider trading as those who have access to the insider information or notice not published by any body corporate such as: director, employee, a person, who can obtain any information or a notice in the capacity of a shareholder of that body corporate, professional and other having direct or indirect contact with the person or source above.

Section 93 of the Act prescribes regarding the public notice or information. According to it information or notice deemed to have been made public if information for the benefit of investors in general or all to a particular group is given or information given or available as per laws and regulation. According to the Securities Act, 2063 false transaction, artificial up and downs in prices, unnatural influence to stock exchange, cheating statistics, conspiring transactions or hiding or destroying particulars are punishable under Section 94 to 100. To control the insider trading practices section 92 of The Companies Act, 2063 has prescribed that a director within seven days of assuming office has to disclose in writing to the company, if he has any dealing or transactions in share or debenture of the company or its holding or subsidiary company, details of such transaction. If any director or concerned officer is in the position of non-compliance of these provisions they are subject to the criminal offence as well as civil offence as the case may be.

BAFIA 2073 Section 12 restricts, during the tenure and a year after the tenure expires, the Director, CEO, auditor, accounting and management and their family member to deal in securities of his company or its subsidiaries and of companies controlled by him or his families. The Act further prescribes that if any person does any act in contravention to above act the concerned bank or financial institution shall forfeit and sell such securities as prescribed by Nepal Rastra Bank.

In the given issue, it is clear that there is insider trading on the part of Nabraj as well as Dinesh under Section 91 of Securities Act, 2063, and also under Section 12 of BAFIA, 2073. In this case the Bank shall forfeit their shares as per Section 12(2) of BAFIA, 2073.

Question No. 24:

What are the requirements of minimum Capital of Securities Business Person?

[December, 2010](5 Marks)

Answer:

Section 67 of Securities Act, 2063 prescribes about the minimum paid up capital as follows:

1) A securities business person shall, in carrying on the securities business, maintain the minimum capital and financial source as prescribed.

2) If a securities business person fails to maintain the minimum capital and financial sources required to be maintained pursuant to sub-section (1), information thereof shall be given to the Board immediately.
3) If the Board receives the information referred to in Sub-section (2), it may immediately order such a securities business person to maintain the minimum capital and financial source as prescribed or given other necessary directives in that regard.

Question No. 25:

ABC Hydro Power P. Ltd. passes a resolution to go for an issue of IPO against the full guarantee of the Government of Nepal. The company also decided to issue certain securities to its' own employees. Board of the Directors of ABC approached you regarding the preparation of a Prospectus for the Issue.

What information, prescribed by the Securities Act, 2063, would you include in the Prospectus?

[June, 2010](5 Marks)

Answer:

A prospectus means any document described or issued as prospectus and includes any notice, circular, advertisement or other document inviting deposits from the public or inviting offers from the public for the subscription or purchase of any shares in or debentures of a body corporate. Thus a document is considered as a prospectus if it satisfies two thing:

i. It invites subscriptions to shares or debentures or invites deposit
ii. The aforesaid invitation is made to the public.

While publishing prospectus it must be dated, and that date is deemed to be the date of publication of the prospectus.

Contents of a prospectus:

Generally, contents of a prospectus can be divided into three parts:

In the first part, brief particulars are to be given about matters related to general information regarding name, address and registered office of the company, capital structure of the company, terms of the present issue, particulars of the issue, company management and project, future prospects, stock market, date etc.

In the second part, it requires the company to give detailed information regarding general information, financial information and statutory and other information. Under general information it requires to provide about the consent of directors, auditors, managers to the issue, approval of the security of the board, procedure and time schedule for allotment and issue of certificates etc. Under financial information it requires to give reports of the auditors of the company with respect to profits and losses and assets and liabilities and the dividend paid during the five financial years, report by the accountants on the profits or losses for the preceding financial years and on the assets and liabilities on the date. On the statutory and other information it is to be included information about minimum subscription, underwriting commission and brokerage, material contract and time and place where such documents may be inspected etc. These are the general requirements to be included in a prospectus.

Section 30 of the Securities Act prescribes that for issuing securities a body corporate have to get a prospectus approved by the board and publish the prospectus for information to all the concerned for making public issue of securities. Under Section 31, the board shall approve only a prospectus which contains such information as may be adequate for investors to make evaluation as to the assets and liabilities, financial status, profits and losses of the issuer and expected matters in the future. Therefore Section 32 of the Act prescribes that every prospectus should contain such general matters as required to be set down in the prospectus, capital and other information of the issuer, main function to be done by the issuer, information pertaining to legal action, economic condition, general administration, management of the issuer, information relating to the expert preparing the prospectus and the economic statements contained in the prospectus and such other matter as may be stated.

Section 33 of the Act prescribes regarding the liability for matters referred to in prospectus. According to it cheating, false statements, particulars in prospectus make the institution, signatory directors and experts preparing it individually or collectively for compensation to the subscribers being based on it.

However Section 30 (2) prescribes that the prospectus is not required to issue for the issue of following securities:

a) Securities issued by the NRB
b) Securities issued against the full guarantee of the Government of Nepal.
c) Securities proposed to be sold to up to fifty persons at a time,
d) Securities issued to own workers or employees.
e) Securities permitted by the board as to issue and sell without issuing a prospectus

So in the given issue as ABC Hydro Power Company is issuing securities against the full guarantee of the Government of Nepal. In such case issuing of a prospectus is not required, as per the proviso clause of Section 30 of the Act. Hence, there is no question of preparation of prospectus for ABC Company.

Where it is required to prepare a prospectus it is to be prepared by adopting the general principles as said above and the guidelines prescribed by Section 32 of the Securities Act so that the investors and share subscribers are furnished full information about the share issuing company.

Question No. 26:

Dwell upon the introduction, functions, duties and powers of Nepal Securities Board as provided under Securities Act, 2063.

[Final/June, 2010](5 Marks)

Answer:

Introduction of Nepal Securities Board

(1) A Board to be known as the Nepal Securities Board has been established pursuant to section 3(1) of Securities Act, 2006 in order to regulate and manage the activities of the securities markets and persons involved in the securities business by regulating the issue, purchase, sale

and exchange of securities in order to develop capital market and protect the interest of investors in securities.

(2) The Board formed under sub-section (1) above shall consist of the following members;

(a) A person appointed by Government of Nepal - Chairman
(b) Joint-Secretary, Ministry of Finance - Member
(c) Joint-Secretary, Ministry of Law, Justice and Parliament Affairs - Member
(d) Representative, Nepal Rastra Bank - Member
(e) Representative, Nepal Chartered Accountants Association - Member
(f) Representative, Federation of Nepalese Chambers of Commerce and Industries - Member
(g) One person nominated by Government of Nepal on the recommendation of the Board from among experts connected with the management of stock exchanges, development of capital market or the financial or economic sector - Member

(3) Nomination to be made under clauses (e) and (f) of sub-section (2) shall be made by the concerned bodies from among persons who have acquired at least a Bachelor's Degree and gained at least five year experience of work in the field of accounts, industry, commerce, finance, banking, economy, or law.

(4) A member nominated under clauses (g) of sub-section (2) shall have a term of three years.

(5) The mere vacancy in the post of a member shall have no effect on the business executed by the Board.

(6) An officer-employee of the Board designated by the Board shall work as its Secretary.

(7) The Board may, if it so deems necessary, invite any local or foreign expert or advisor to participate in its meetings in the capacity of an observer.

(8) The Central Office of the Board shall be located in the Kathmandu Valley, and the Board may open its branches or liaison offices within or outside Nepal according to need.

The Board shall be an autonomous and Corporate Body pursuant to section 4 of the Act.

Functions, Duties and Powers of the Board have been prescribed under Section 5 of the Securities Act, 2006. They are as follows:

(a) To offer advice to the Government of Nepal on matters connected with the development of the capital market according to need.
(b) To register the securities of corporate bodies established with the authority to make a public issue of its securities.
(c) To regulate and systematize the issue, transfer, sale and exchange of registered securities.
(d) To give permission to operate a stock exchange to any corporate body desirous of doing so, subject to this Act or the rules and bye-rules framed under this Act.
(e) To supervise and monitor the functions and activities of stock exchanges.
(f) To inspect whether or not any stock exchange is executing its functions and activities in accordance with this Act or the rules and bye-rules framed under this Act, and to suspend or cancel the license of any stock exchange which is not found to be doing so.

(g) To issue license to conduct the business of dealing in securities, subject to this Act, to companies or institutions desirous of conducting the business of dealing in securities.
(h) To supervise and monitor the functions and activities of security-dealers.
(i) To classify and determine the grades of security dealers on the basis of their work and capacity by fulfilling the prescribed formalities.
(j) To grant permission to operate collective investment schemes and investment fund programs, and to supervise and monitor them.
(k) To approve the bye-rules concerning transactions in securities framed by stock exchanges and institutions engaged in the business of dealing in securities, and, for the purpose of making necessary provisions concerning the development of the capital market and protecting the interests of investors investing in securities, issue orders to have necessary alterations made in such bye-rules of stock exchanges and institutions engaged in the business of dealing in securities.
(l) To systematize the task of clearing accounts related to transactions in securities.
(m) To supervise whether or not security-dealers are behaving in the manner prescribed in this Act, or the rules, bye-rules and manuals framed under this Act, while conducting the business of dealing in securities, and suspend or cancel the license to conduct the business of dealing in securities in case any security-dealer is not found to be behaving accordingly.
(n) To make or ensure necessary arrangements to regulate the volume of securities transacted and the procedure of conducting such transactions in order to ensure the promotion, development and clean operation of stock exchanges.
(o) To make necessary arrangements to prevent insider trading or any other offenses relating to transactions in securities as mentioned in Chapter 9 in order to protect the interests of investors in securities.
(p) To review or make arrangements for reviewing the financial statements submitted by corporate bodies issuing securities and security dealers, and issue directives deemed necessary in that connection to the concerned corporate body.
(q) To systematize and make transparent the act of acquiring the ownership of a company or gaining control over its management by purchasing its shares in a single lot or in different lots.
(r) To establish coordination and exchange cooperation with the appropriate agencies in order to supervise and regulate matters concerning securities or companies.
(s) To discharge or make arrangements for discharging such other functions as are necessary for the development of securities and the capital market.

Question No. 27:

What do you mean by 'Insiders Trading'? Who are the persons likely to have involvement in insider trading?

[December, 2007](5 Marks) [December, 2009](5 Marks)

Answer:

If any person conducts or causes to conduct transactions in securities on the basis of any inside information or report which has not been made public and which can have an impact on the price of the securities, or supplies such information or report in his possession to any other person, except in the course of discharging his duties, he shall be deemed to have carried out an insider trading under the Securities Exchange Act, 2063.

For the purposes of the Act, the following persons shall be deemed to have access to unpublished inside information and hence are likely to have involvement in insiders trading:

i) Persons who can obtain any information or report of a corporate body in their capacity as its directors, employees or shareholders;
ii) Persons who can obtain any information or report of a corporate body in their capacity as persons providing any professional service to the corporate body;
iii) Persons who can obtain any information or report because of their direct or indirect contacts with the persons or sources mentioned above.

Question No. 28:

Describe the role of Security Exchange Board of Nepal in checking unethical activities in the security market.

[June, 2009](5 Marks)

Answer:

Section 5 of Securities Act, 2063 has made the provision in respect of the functions, duties and powers of the Securities board of Nepal. Inter alia, the board has the powers to:

a. Regularize and systematize the issue , transfer and sale of the security; and
b. Monitor and regulate the activities of the security market and the businessmen working in the security market.
c. To offer an advice, as per necessity, to the Government of Nepal on matters incidental to the development of capital market,
d. To register the securities of any corporate body established with the authority to make a public issue of its securities,
e. To regulate and systematize the issue, transfer, sale and exchange of registered securities,
f. 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,
g. To regulate and monitor the activities of the stock exchange;
h. 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,

i. 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,
j. To regulate and monitor the activities of securities business person,
k. To classify securities business persons and fix their standards according to their functions and capability by fulfilling such procedures as prescribed,
l. To grant a permission to operate collective investment schemes and investment fund programs, and to regulate and monitor the same,
m. 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,
n. To systematize the clearance of accounts related to securities transactions,
o. 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,
p. 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,
q. 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,
r. To review, or cause to be reviewed, financial statements submitted by corporate bodies issuing securities and securities business persons, and give such directives to the concerned corporate bodies as it deems necessary in this connection,
s. To regulate and make transparent the act of acquiring the ownership of a company thereby gaining control over its management by purchasing its shares in a single lot or in several lots,
t. To maintain coordination and exchange cooperation with the concerned agencies in order to supervise and regulate matters concerning securities or company affairs,
u. To perform or cause to be performed such other functions as may be necessary in relation to securities and the development of capital market.
v. In this connection the board can check the unethical activities of the security market.

Question No. 29:

Enumerate the cases where publication of prospectus is not required for public issue as per the Securities Exchange Act, 2063. Does the Companies Act, 2063 specifically exempt publication of Prospectus in any case?

[December, 2007](5 Marks)

Answer:

Section 30(2) of the Securities Exchange Act 2063, enumerates the cases where publication of prospectus is not required for public issue, which are as under:

i) Issue of Securities by the Nepal Rastra Bank.
ii) Issue of Securities under full guarantee of Nepal Government.
iii) Issue of Securities proposed to be sold not exceeding to 50 persons at a time.
iv) Issue of Securities to staff or workers of a company.
v) Issue of Securities which are permitted by the Securities Board without publication of prospectus.

In addition to the above, Proviso to **Section 56(6)** of the Companies Act, 2063, specifically states that provisions applicable for issue of securities by a public company as prescribed in the Securities Exchange Act shall not apply in case of Right Issue to the existing shareholders. Hence, in case of issue of Right shares to existing shareholders, publication of prospects is not required.

Question No. 30:

What do you understand by Collective Investment Scheme?

[June, 2007](5 Marks)

Answer:

Collective Investment Scheme is a participative fund management program in which different individuals and or entities participate and the Scheme Manager pools their savings together, makes appropriate investments by taking responsibility of such funds and distributes the proceeds to the participants of the program in a proportionate basis.

Collective Investment Scheme includes such participative funds managed by a Scheme Manager as per the Securities Act, 2063, individual funds or such other participative funds prescribed by the Securities Board from time to time under Sub-section (Ba) of Section 2 of Securities Act, 2063.

Question No. 31:

Narrate the various circumstances contained in the Securities Exchange Ordinance, 2062 where the prospectus need not be published to issue the securities.

[December, 2006](5 Marks)

Answer:

In the following circumstances, prospectus need not be published while issuing the securities under the provision of Section 30 of Securities Act, 2063:

i) Securities issued by Nepal Rastra Bank.
ii) Securities issued on fully guaranteed by Government.
iii) Securities issued up to 50 people once at a time.
iv) Securities issued to the workers or employees of the organization.

v) Other cases where the Board has given approval to issue securities without publishing the prospectus.

Question No. 32:
What do you understand by the term "Market Maker"?

[June, 2006](5 Marks)

Answer:
Market makers are financial intermediaries which provide liquidity in the security market. They are Companies or Corporate bodies which take up the membership of stock exchange on the basis of commitment of providing liquidity on the securities issued by Government and other securities listed in the stock exchange. The market maker enters into an agreement with the Company to whose security it is going to provide liquidity. The market maker also ensures that there is no unreasonable instability in the price of the securities in which it deals.

Question No. 33:
Why listing of securities is to be required? What are the grounds when a Stock Exchange may refuse for listing of securities of a body corporate? Explain in brief, with reference to the provisions of the Stock Exchange Act 1983.

[June, 2005](5 Marks) [December, 2005](5 Marks) [December, 2003](4 Marks)

Answer:
Section 43 of Securities Act, 2063 prescribes that a stock exchange shall manage a market only for those securities which are recognized by either enlisting in its bye-laws, as prescribed, securities issued by bodies corporate or making similar other provisions.
The corporate body shall list the securities issued and allotted by it in the Stock Exchange before making the transactions of such securities. Therefore, to make the transactions of buying and selling of securities of a corporate body through stock exchange, listing is required.

The following are the grounds when a Stock Exchange may refuse for listing of securities of a body corporate prescribed by the Act:

- if on the basis of number of shareholders and allocation of capital, the transactions not analyzed to be active.
- If easy transfer or change of ownership of securities is not possible.
- If the economic and financial condition does not seem to be satisfactory and
- If there are any other reasonable causes.
- In case, the listing of security is refused or withheld pursuant to sub-section (1), notice of the same shall be given to the concerned corporate body stating the reason thereon and the Board shall also be informed.

Question No. 34:
What do you understand by the term (i) Registration (ii) Listing of Securities under the Securities Exchange Act, 2040?

[December, 2004](5 Marks)

Answer:
As per clause (h) of section 2 of Securities Act 2063, "Registration of securities" means the registration of securities by a body corporate with the Board pursuant to Section 27.
Thus registration means the act of getting the securities registered with the security Board in order to ensure that such securities could be sold publicly in the open market or by circulation.
As per clause (x) of section 2 of Securities Act 2063, "Enlisting" means the enlisting of securities on a stock exchange for the purposes of purchasing, selling or exchanging securities through the stock exchange.

Question No. 35:
How is the renewal of the Stock Exchange and Securities Business professionals carried on? State the latest amendments in relation to the transfer of promoters' shares.

[June, 2004](10 Marks)

Answer:

i. Stock Exchange:

Section 42 of Securities Act, 2063 prescribes about the renewal of the license of stock exchange as follows:

1) The license issued to carry on a stock exchange shall remain valid only until the last day of the fiscal year of its issue.
2) The corporate carrying on a stock exchange shall have to renew the license to carrying on a stock exchange by paying to the Board an annual fee as prescribed not later than three months after the expiry of each fiscal year.
3) In the event of failure to get renewed such a license by paying the annual fee within the time limit referred to in sub-section (2), the license may be renewed by paying a fine of twenty five percent of the annual fee up to three months after the expiry of such time limit.
4) The license to operate stock exchange obtained by a body corporate which fails to renew even within the time limit referred to in sub-section (3) shall be terminated.

ii. Securities Business:

Section 61 of Securities Act, 2063 prescribes about the renewal of the license of securities business as follows:

1) The license issued to a securities business person to carry on securities business under this Act shall remain valid only until the end of that fiscal year in which it has been issued.

2) The securities business shall have to get such a license renewed by paying the annual fees as prescribed to the Board within three months from the date of expiry of each fiscal year.
3) In the event of failure to get a license renewed by paying the annual fees within the time-limit referred to in sub-section (2), such license may be got renewed by paying a fine of twenty-five percent of the annual fees up to three months from the date of expiry of that time limit.
4) The Board shall revoke the license of a securities business person who has failed to get such a license renewed even within the time-limit referred to in sub-section (3), and publish a notice thereof for information to the general public.

CHAPTER-4

BANKS AND FINANCIAL INSTITUTIONS ACT, 2073

[Note: All answers suggested hereby have been updated as per BAFIA, 2073 and To Make Favorable with Constitution of Nepal Some Nepal Acts Amending Act,

Question No. 1:

DBS, a swiss bank, awarded by the World Bank of the Year (2022), has willing to open branch office to carry on banking and financial transactions within Nepal. As you are consultant of the bank, advise them the process and provisions as to open branch office of the DBS in Nepal on the basis of the legal measures provided in the Bank and Financial Institution Act, 2073.
(December 2022) (10 Marks)

Answer:

The Bank and financial institution Act, 2073 has provided the legal measures to open branch office of internationally rated foreign bank or financial institution. Yes, it is provide in the section 6 of the Act. It is required following process provided in the Act.

i) **Prior Approval:** Subsection 1
If any internationally rated foreign bank or financial institution desires to open branch office to carry on banking and financial transaction or non-banking financial transaction within Nepal, prior approval of the Rastra Bank should be obtained before opening such branch office.

ii) **Application:** Subsection 2
An application has to be submitted to Rastra Bank along with the **capital and fees** as prescribed by the Rastra Bank.

iii) **Details and documents to be submitted:** Subsection 3
While submitting application pursuant to Sub-Section (2), such foreign bank or financial institution shall have to submit the following details and documents in addition to the details and documents as referred to in Sub-Section (1) of Section 5:-

- Written commitment of the Board of Directors that it will make available on demand of the Rastra Bank the amount necessary for fulfilling its entire liabilities with regard to business activities of its branch of representative or liaison office of concerned foreign bank or financial institution in Nepal,
- Details as to the location of the proposed branch office of the foreign bank or financial institution,
- Details as to the possible office bearers to be engaged in the proposed branch office of the foreign bank or financial institution.

iv) **Inquiry of details and documents and demand thereof:** Subsection 4
The Rastra Bank may, If deems necessary to demand further documents or details while carrying out inquiry to the documents or details submitted pursuant to Sub-Section (3), demand required documents or details from concerned applicant. The Rastra Bank may inquire of the additional documents submitted pursuant to Sub-

Section (3) and of the documents asked for submission pursuant to Sub-Section (4).

v) **Grants of Approval**: Subsection 5.
After carrying out such inquiry and deems appropriate Rastra Bank may grant approval to open a branch office in Nepal within **one hundred twenty days after filing of the application**, with or without prescribing any conditions.

vi) **Registration of branch office:** Subsection 6
The foreign bank or financial institution, after obtaining prior approval pursuant to Sub-Section (5), shall have to get registered as the branch office according to the prevailing laws relating to companies.

vii) **Approval to carry on banking and financial transaction**: Subsection 7
The branch office of the foreign bank or financial institution registered shall have to submit an application before the Rastra Bank along with the **following documents and details** as well as the charge or fee as prescribed by the Rastra Bank for approval to carry on baking and financial transaction in Nepal:-
   (a) **Registration certificate** of being registered according to the prevailing laws to carry on banking and financial transaction in Nepal as a branch office,
   (b) **Letter of approval or consent granted by the Government or central bank or regulating agency** according to the law of concerned country of the foreign bank or financial institution to open branch office of such bank or financial institution in Nepal,
   (c) **Details of the discrepancy**, if any, in any matter to be completed by the concerned foreign bank or financial institution under this Act after submission of application before the Rastra Bank for establishment of a branch office of the foreign bank or financial institution or after obtaining approval from the Rastra Bank,
   (d) **Other information and documents demanded** by the Rastra Bank.

viii) **Inquiry on application and approval for transaction**: Subsection 8
The Rastra Bank may carry out inquiry over the application received if it deems necessary. After inquiry Rastra Bank may grant approval to such branch office of foreign bank or financial institution for carrying on banking and financial transaction in Nepal **within 90 days** from the date of filing the application.

ix) **Prior Approval may be denied**: Section 7
The Rastra Bank may deny to grant prior approval for open branch office of the foreign bank or financial institution in following circumstances:
   (a) If the **name** or **banking and financial transaction** to be carried out by the proposed bank or financial institution is **not found to be appropriate from the point of view of public interests, religion, ethnicity or traditional belief,** etc.,

(b) If the **objective** of the proposed bank or financial institution is **contrary to the prevailing laws**,
(c) If **incorporation** of the proposed bank or financial institution **does not seem to be technically appropriate**,
(d) If study of the **feasibility study report**, details and documents other infrastructures submitted by the proposed bank or financial institution **does not provide a ground to believe** that it may carry on financial transactions **in a healthy and competitive manner**,
(e) If **not all promoters** of the proposed bank or financial institution have **signed** the Memorandum of Association and Articles of Association, also stating their **names, address and number of shares** subscribed by them, in the presence witness and the name and address of the witnesses have not been mentioned,
(f) If **per person share investment limit and share ownership ratio** has **not been found to have been maintained as specified by the Rastra Bank from time to time**,
(g) If it is **found to be inconsistent with the policy relating to incorporation of bank or financial institution and licensing policy** issued by the Rastra Bank,
(h) If **any condition** as prescribed by the Rastra Bank has **not been found to be fulfilled**.

If the Rastra Bank **denies granting prior approval** to the proposed bank or financial institution for any of the reasons referred to above, **information shall be given** to the applicant stating reasons thereof

Question No. 2:

Incorporation of a bank or a finance company is a complex process. It involves or applies a host of legislations and regulations for its accomplishment in which the major enabling legislations are Companies Act, 2063 and Banking and Financial Institutions Act, 2073. In the light of this background, answer the following questions in relation to the incorporation of a finance company: **(December 2021) (7 Marks)**

i) State the procedures of incorporation of a finance company under the Companies Act, 2063.

ii) List out the documents required to incorporate a finance company under the Bank and Financial Institutions Act, 2073.

Answer:

i) Section 3, 4, 5, 7, 8, 9, 10 and 11(1) of the Companies Act, 2063 deal with the incorporation of a Company (in this case Finance Company) as under:

(1) Any person desirous of undertaking any enterprise with profit motive may, either singly or jointly with others, incorporate a company for the attainment of one or more objectives set forth in the memorandum of association.

(2) There shall be a minimum of seven promoters for the incorporation of a public company.

Section 4 requires application to be made for incorporation of a company as under:

(1) Any person desirous of incorporating a company pursuant to Section 3 shall make an online application to the Company Registrar's Office (Office) through electronic device for obtaining approval of the proposed name of the company. After getting approval of the proposed name of the applicant company by the CRO, the applicant shall make an online application through electronic device, in such format and accompanied by such fees as prescribed, and along with the required documents.

Section 5 of this Act requires the CRO to cause registration of the proposed company as under:

(1) Where an electronic application is made for the incorporation of a company pursuant to Section 4, the CRO shall, after making necessary inquiries, register such company within 7 days after the date of making of the application and grant the company registration certificate to the applicant, in the format as prescribed.

(2) After a company has been registered pursuant to Sub-section (1), the company shall be deemed incorporated.

ii) Incorporation of Banks or Financial Institutions (in this case Finance Company) has been provided under sections 3, 4(1) and (2) of Banks and Financial Institutions Act (BAFIA), 2073 as under:

Accordingly section 3 provides that:

(1) Any person, wishing to incorporate a bank or financial institution to carry out financial transactions according to this Act shall incorporate it by getting such a bank or financial institution registered as a public limited company in accordance with the prevailing laws:

(2) An official authorized in accordance with the prevailing laws in force to register a company pursuant to Sub-Section (1) shall register the company subject to Section 4.

Section 4 provides prior-approval to be obtained to Incorporate Banks or Financial Institutions as under:

(1) A person or an institution desires to incorporate a bank or financial institution for the purpose of Section 3 shall, while making an application for getting such a bank or a

financial institution registered according to the prevailing laws, make an application to the Rastra Bank along with the prescribed fee for obtaining prior approval having enclosed therewith the following documents:-

(a) Memorandum of Association of the proposed bank or financial institution,

(b) Articles of Association of the proposed bank or financial institution,

(c) Feasibility study report of the proposed bank or financial institution,

(d) Personal details of the applicant in the form as prescribed by the Rastra Bank,

(e) A certified copy of the agreement, if any, concluded between the applicants prior to incorporation of the bank or financial institution in relation to incorporation of the bank or financial institution,

(f) Evidence of the statement disclosing the sources of incomes and of tax clearance by the applicants up to the fiscal year immediately preceding the making of the application pursuant to this Section,

(g) Details as to whether or not the applicant of the proposed bank or financial institution has become a bankrupt in Nepal or abroad, whether or not he/she has borrowed any loan from any bank or financial institution, whether or not the person has been blacklisted in any transaction with a bank or financial institution, if so, whether or not a period of three years has lapsed after having such a blacklisting,

(h) Self-declaration of the applicant stating that no action has been taken against and no punishment has been imposed on the applicant in Nepal or abroad for being involved in cheating, fraud or any criminal offence deemed to be as such as per the prevailing laws,

(i) Details as to whether or not any action has been taken against the applicant in Nepal or abroad by any regulatory or oversight authority or whether or not a license of the company or bank or financial institution in which he/she is associated with has been suspended, revoked or subjected to compulsory liquidation or is in the course of being so,

(j) Details as to the names, surnames, addresses and relationship of the family members of the applicant; substantial ownership and capacity of each of them and if any of them is a Director, official or employee in any institution, details as to the title of the post each of them holds:

Provided that in cases where a applicant is a corporate body, details as to the person having substantial ownership or position in that corporate body, the audited financial statements of the last three years as well as the tax clearance certificate of that corporate body shall also be enclosed.

(k) Written authority given to the Rastra Bank to allow it to conduct or to cause to conduct an inquiry as to the financial and professional background of the applicant and to share such notice and information,

(l) An undertaking that the deposits to the limits as prescribed by the Rastra Bank will be guaranteed,

(m) Other details or documents as specified by the Rastra Bank from time to time.

(2) The Rastra Bank may, if it finds appropriate to grant approval upon the examination of the application submitted for prior approval pursuant to Sub-Section (1) and enclosed documents, grant its approval to incorporate such a bank or financial institution within one hundred twenty days after filing of the application, with or without prescribing any conditions.

Question No. 3:

Mr. Saurav has been working as an in-charge of recovery unit of National bank Ltd. This bank has endorsed a strategic plan to recover credit by forty percent this fiscal year 2078.079. He called upon you as a consultant of credit recovery and asked on the prevailing law on credit recovery. As you are credit recovery consultant, suggest the credit recovery provision to Mr. Saurav in accordance with the Bank and Financial Institution Act, 2073. **(December, 2021) (10 Marks)**

Answer:

Section 57 of Bank and Financial Institution Act (BAFIA), 2073 has provided the process of credit recovery as follows:

(1) Recovery by selling the assets (Section 57(1):

Any bank or financial institution may recover its principal and interests having sold by auction the assets taken or put as mortgaged by the borrower in the name of the bank or financial institution.

Bank may proceed the recovery process if the borrower fails to abide by the terms of the credit as mentioned in the deed or agreement or any terms and covenants made with a bank or financial institution or fails to repay credit to the bank or financial institution within the time-limit stipulated in the deed, or if the bank or financial institution is found, through the monitoring conducted pursuant to Section 56, that it has misused the credit by using it for the purpose other than the purpose for which it was disbursed.

(2) Placing more assets as collateral security (Section 57(2):

In case the borrower surrenders the title in any manner whatsoever over the assets mortgaged collateral security or the value of assets mortgaged as collateral security to the bank or financial institution is decreased, the bank or financial institution may ask such borrower to place more assets as collateral security within the time limit specified by it and the borrower shall have to place additional collateral security within the time-limit prescribed by the bank or financial institution.

(3) Recovery from the movable or immovable assets of borrower (Section 57(3):

In case the borrower fails to place more assets as collateral within the time limit pursuant to Sub-Section (2) or the principal and interest could not be recovered from the collateral security so mortgaged, the bank or financial institution may recover its principal and interest from the movable or immovable assets under the ownership or title of the borrower according to the prevailing laws.

(4) Refund the remaining amount to the borrower (Section 57(4):

In case any amount remains after deducting the amount realized from auction sale or other provisions under this Section from the amount of expenses and the amount of principal and interest of the bank or financial institution, such remaining amount shall have to be refunded to the concerned borrower.

(5) Register or transfer the assets in the name of person auctioned (Section 57(5) and (6):

The bank or financial institution shall write to the concerned office to register or transfer the ownership of the assets so auctioned as per this Section in the name of the person accepting the auction in accordance with the prevailing law. The concerned office shall have to register or transfer the ownership of the assets as requested.

(6) Taking ownership of the assets which is accepted by no one (Section 57(7) and (8) :

In case no one accepts the movable or immovable assets while carrying out auction by the bank or financial institution under this Section, the bank or financial institution shall take into its ownership such assets as prescribed. The concerned office has to register or transfer the ownership of the assets in the name of the concerned bank or financial institution if it is requested with the decision as per the existing laws.

(7) Taking Government action for enjoying the assets (Section 57(9):

In case the then owner denies to, or obstructs in, possessing the property accepted by any person or a bank or financial institution and the party accepting the auction who has the right to enjoy the assets according to laws, the concerned body of Government of Nepal shall take action to cause to possess of said property as per the prevailing law.

(8) Continuing the recovery process (Section 57(10):

The licensed institution shall not be entitled to suspend the recovery process of the credit written off subject to the prevailing Credit Write-off Byelaws.

(9) Blacklisting (Section 57(11):

In case a borrower does not repay the credit from a bank or financial institution and the interest accrued thereto and penal interest within the time limit stipulated in the deed of the credit or the contract, the bank or financial institution shall have to write to the Credit Information Bureau Limited to blacklist such borrower according to the prevailing laws.

(10) Freezing any assets of borrower located in foreign country (Section 57(12):

In case the credit could not be recovered even after taking actions against the borrower under this Section, the bank or financial institution may, for the purpose of recovering such credit amount, take actions for recovery of the credit according to the prevailing laws including freezing of any assets of the borrower located in a foreign country.

(11) Withhold or confiscate the passports and deprive the state services (Section 57(13):

In case the credit could not be recovered even after taking all actions under this Section, the concerned bank or financial institution may request the Rastra Bank for making necessary provisions to withhold or confiscate the passport/s of the concerned borrowers and to deprive the concerned borrower from availing the services to be made available by the state. Upon receipt of such request, Rastra Bank shall have to forward the request to Government of Nepal for necessary actions along with its opinion.

Question No. 4:

Finance Minister has consulted you to know the appointment and terms and conditions of services of the Chief Executive Officer of a bank. State the relevant provisions of the Bank and Financial Institution Act, 2073.

(June, 2021) (5 marks)

Answer:

Bank and financial Institutions Act, 2073 has comprised a chief executive officer. Section 29 has provided its procedures, terms and conditions of the appointment and its service as following:

(1) The Board of Directors shall, subject to this Act, Memorandum of Association and Articles of Association, appoint one Chief Executive for management of the bank or financial institution.

(2) The tenure of office of the Chief Executive shall be of four years in maximum and he/she may be re-appointed again for next one term of office.

(3) The provision referred to in Sub-Section (2) shall come into force after commencement of this Act.

(4) Notwithstanding anything contained in Sub-Section (2), the Board of Directors may remove the Chief Executive from his/her office at any time; in case his/her work performance has not been satisfactory. Provided that before removing from the office, reasonable opportunity shall have to be provided to him/her to submit clarification.

(5) While appointing an Chief Executive, the persons having possessed the following **qualifications and experience** shall be appointed and information thereof shall be furnished to the Rastra Bank within seven days from the date of appointment:-

(a) Having attained Master's degree in management, banking, finance, monetary, economics, commerce, bookkeeping, statistics, account, mathematics, business administration or law,

(b) Having work experience of at least ten years as an officer level or above in banking or finance sector, government agency, corporate body, university or an international institution or organization to carry on similar works after having attained bachelor's degree in chartered accountancy or management, banking, finance, monetary, economics, commerce, bookkeeping, statistics, account, mathematics, business administration or law,

Provided that in case of the Chief Executive of a Class "D" financial institution, one shall have to possess the academic qualifications and work experience as specified by the Rastra Bank.

(c) Having completed the criteria as prescribed by the Rastra Bank with regard to appointment of the Chief Executive,

(d) Not been disqualified pursuant to Sub-Section (1) of Section 18. Provided that disqualifications as mentioned in Part (i) and (n) of SubSection (1) of the Section 18 shall not apply with regard to the Chief Executive.

(6) In case the Chief Executive appointed pursuant to Sub-Section (1) has not been found qualified according to this Act, the Rastra Bank may issue order to the concerned bank or financial institution to remove such Chief Executive and to appoint another person being qualified to get appoint in the post of Chief Executive.

(7) Remuneration and terms and conditions of service and other facilities of the Chief Executive shall be as specified by the Board of Directors and the terms and conditions of service and facilities shall have to be fixed at the time of his/her appointment.

(8) The Chief Executive of any bank or financial institution may not be appointed as the Chief Executive, official, employee or in other position in any other business organization. Provided that provision of this Sub-Section shall not be deemed to have made obstruction

to be the Director of an Infrastructure Development Bank in which the bank or financial institution has made investment in such development bank.

Question No. 5:

Board of Directors of a Bank and Financial Institution plays an important role for carrying the banking business. The success of the banking business totally depends upon the composition of the Board of Directors and their ability to operate the institution. State how the Board of Directors of the Bank and Financial Institution is constituted along with their tenure. Also state who are not eligible to be appointed as a Board of Director as per the Bank and Financial Institution Act, 2073?

(Dec, 2019) (8 marks)

Answer:

Section 14 of the Banks and Financial Institutions Act, 2073 prescribes the provision regarding the constitution of Board of Directors of a bank or financial institution. As per the Section, a bank or financial institution will consists of a Board of Directors comprising at least five Directors and not exceeding seven Directors.

Appointment of Directors:

According to the provision of the Section 14 of the Act, the General Meeting of a bank or financial institution will appoint the Directors Subject to Act and the Articles of Association, However, before convening of the first Annual General Meeting of the bank or financial institution, promoters themselves will appoint the Directors. Furthermore in case where the position of any Director falls vacant before the holding of the Annual General Meeting, the Board of Directors may appoint a Director until the next General Meeting is held. In cases where any corporate body has subscribed shares, it may appoint Directors in proportion to the number of shares it has subscribed and while nominating in such a manner, the same person shall not be nominated to more than one bank or financial institution. While appointing so, the concerned company also appoints an Alternate Director to work in the absence of the Director. The Board of Directors also appoints at least one independent director from among the persons possessing qualifications and experience set forth in Section 17 of the Act. The information thereof will be furnished to the First General Meeting to be held after such an appointment. There is certain restriction of the appointment of the Independent Director and Director from a single family. Thus a promoter, director or shareholder possessing more than zero point one percent share of a bank and financial institution and his/her member of family cannot become an independent Director.

In case of Directors, no more than one member of a family may become a Director of any bank or financial institution at the same time. The chairperson of the Board of Directors will be a Director chosen by the Directors from among themselves by majority votes.

Term of Office of the Directors:

According to Section 15 of the Act, the term of office of a Director will be for a maximum period of four years as provided for in the Articles of Association and he/she may be eligible to be reappointed or re-nominated. However, an Independent Director may be appointed for only one term of office.

Disqualification of Directors:

Section 18 of the Act prescribes the disqualification of Directors. According to it the following persons will not be eligible to become a Director of a bank or financial institution:-

(i) If he or she has not attained the age of 25 years,

(ii) If he or she is of unsound mind or insane,

(iii) If he or she has been declared bankrupt in Nepal or abroad for being unable to pay debt,

(iv) If he or she has been blacklisted or declared a defaulter in connection with any transaction with any bank or financial institution in Nepal or in abroad, and a period of at least three years has not been lapsed after removal of his\her name from the blacklist or list of defaulter

(v) An incumbent Director or an employee of any corporate body carrying out transactions of a bank or financial institution or any institution collecting any type of deposits or carrying out transactions relating to insurance,

(vi) A borrower or an incumbent auditor or an advisor of the concerned bank or financial institution or a person, firm or company who/which is a partner in any kind of contract with the concerned bank or financial institution or having personal interests,

(vii) Who has acquired the membership of the Stock Exchange to act as a securities broker or a merchant banker,

(viii) Incumbent Director of a licensed bank or financial institution,

(ix) A person, who has not subscribed to the minimum number of shares required to subscribe to be eligible for appointment as a Director pursuant to the Articles of Association of a bank or financial institution,

(x) Incumbent employee of the Government of Nepal, or a corporate body having ownership of the Government of Nepal, or Rastra Bank or of a bank or financial institution, Provided that nothing in this clause shall prevent from nominating a Director in a micro-finance institution or infrastructure development bank, of which share has been purchased by the Government of Nepal or an institution having under the ownership of the Government of Nepal or Rastra Bank or bank or financial institution.

(xi) Who, having a liability to pay taxes pursuant to the laws in force, has failed to pay the same

(xii) If he or she has not completed a period of ten years after serving out the sentence upon being convicted of an offence of theft, cheating, forgery, fraud, corruption, any offence involving moral turpitude or a banking offence from a court of Nepal or that of a foreign country,

(xiii) If action had been taken against him or her by a regulatory agency as per the law for committing an act in contravention of the law and if he or she has not completed a period of five years after being taken such action,

(xiv) In the case of an independent Director, If he or she is a promoter or a shareholder holding ownership of more than 0.1 % share of the concerned bank or financial institution,

(xv) If he or she has not served the full sentence or is yet to clear the dues of the fine imposed by a court of law or if he or she is in arrears to pay a government due.

(2) Notwithstanding anything contained in Clause (e) of Sub-Section (1), an official or employee of a bank or financial institution may work as a Director of a subsidiary company of the same bank or financial institution.

According to Section 20 of the Act, any person, who holds a constitutional position cannot remain in the Board of Directors so long as he/she is holding such a position.

Question No. 6:

Mr. R K Kayastha has been working in the RB Bank Ltd in Recovery unit. He has to more credit to be recovered on behalf of bank. The Bank and financial Institution Act, 2073 (BAFIA) has mentioned its procedure that how credit is recovered. As you are credit recovery experts, suggest the credit recovery provision to Mr. RK in accordance with the BAFIA.

(Dec, 2019) (5 marks)

Answer:

Section 57 of BAFIA has provided the process of credit recovery as follows:

(1) Recovery by selling the assets:

Any bank or financial institution may recover its principal and interests having sold by auction the assets taken or put as mortgaged by the borrower in the name of the bank or financial institution.

Bank may proceed the recovery process if the borrower fails to abide by the terms of the credit as mentioned in the deed or agreement or any terms and covenants made with a bank or financial institution or fails to repay credit to the bank or financial institution within the time-limit stipulated in the deed, or if the bank or financial institution is found, through the monitoring

conducted pursuant to Section 56, that it has misused the credit by using it for the purpose other than the purpose for which it was disbursed.

(2) Placing more assets as collateral security:

In case the borrower gives off the title in any manner whatsoever over the assets mortgaged collateral security or the value of assets mortgaged as collateral security to the bank or financial institution is decreased, the bank or financial institution may ask such borrower to place more assets as collateral security within the time limit specified by it and the borrower shall have to place additional collateral security within the time-limit prescribed by the bank or financial institution.

(3) Recovery from the movable or immovable assets of borrower:

In case the borrower fails to place more assets as collateral within the time limit pursuant to Sub-Section (2) or the principal and interest could not be recovered from the collateral security so mortgaged, the bank or financial institution may recover its principal and interest from the movable or immovable assets under the ownership or title of the borrower according to the prevailing laws.

(4) Refund the remaining amount to the borrower:

In case any amount remains after deducting the amount realized from auction sale or other provisions under this Section from the amount of expenses and the amount of principal and interests of the bank or financial institution, such remaining amount shall have to be refunded to the concerned borrower.

(5) Register or transfer the assets auctioned in the name of person:

The bank or financial institution shall write to the concerned office to register or transfer the ownership of the assets so auctioned as per this Section in the name of the person accepting the auction in accordance with the prevailing law. The concerned office shall have to register or transfer the ownership of the assets as requested.

(6) Taking ownership of the assets which no one accepts:

In case no one accepts the movable or immovable assets while carrying out auction by the bank or financial institution under this Section, the bank or financial institution shall take into its ownership such assets as prescribed. The concerned office has to register or transfer the ownership of the assets in the name of the concerned bank or financial institution if it is requested with the decision as per the existing laws.

(7) Taking Government action for enjoying the assets:

In case the owner denies to, or obstructs in, possessing the property accepted by any person or a bank or financial institution and the party accepting the auction who has the right to enjoy the

assets according to laws, the concerned body of Government of Nepal shall take action to cause to possess of said property as per the prevailing law.

(8) Continuing the recovery process:

The licensed institution shall not be entitled to suspend the recovery process of the credit written off subject to the prevailing Credit Write-off Byelaws.

(9) Blacklisting:

In case a borrower does not repay the credit from a bank or financial institution and the interests accrued thereto and penal interests within the time limit stipulated in the deed of the credit or the contract, the bank or financial institution shall have to write to the Credit Information Bureau Limited to blacklist such borrower according to the prevailing laws.

(10) Freezing any assets of borrower located in foreign country:

In case the credit could not be recovered even after taking actions against the borrower under this Section, the bank or financial institution may, for the purpose of recovering such credit amount, take actions for recovery of the credits according to the prevailing laws including freezing of any assets of the borrower located in a foreign country.

(11) Withhold or confiscate the passports and deprive the state services:

In case the credit could not be recovered even after taking all actions under this Section, the concerned bank or financial institution may request the Rastra Bank for making necessary provisions to withhold or confiscate the passport/s of the concerned borrowers and to deprive the concerned borrower from availing the services to be made available by the state. Upon receipt of such request, Rastra Bank shall have to forward the request to Government of Nepal for necessary actions along with its opinion.

Question No. 7:

State the circumstances in which Nepal Rastra Bank will advise the financial institution to compulsorily wind up under the Banks and Financial Institutions Act, 2073.

[June 2018](10 Marks)

Answer:

Bank & Financial Institution Act, 2073 prescribes about voluntary and mandatory liquidation of company under its Chapter-11 and 12 respectively. Here the question is related to the compulsory winding up or liquidation of a Bank and Financial Institution under the advice of the Nepal Rastra Bank which has been discussed below.

As per section 79 of Bank & Financial Institution Act 2073, any bank or financial institution may be subjected to mandatory liquidation under the existence of any following circumstance:

a) In case the matured deposit or the deposit to be repaid immediately or other financial liability could not be paid on time and is due,

b) In case capital fund of the bank or financial institution is negative,
c) In case the Rastra Bank recommends for liquidation of a bank or financial institution based on an inspection report of the bank or financial institution,
d) In case the shareholders with significant ownership or officials of a bank or financial institution frequently commit acts causing obstruction against the rights and interests of the depositors for the development of financial system,
e) In case of frequent violations of the this Act and directives given by the Rastra Bank,
f) In other situations as determined by the Rastra Bank for mandatory liquidation of banks or financial institutions.

As per section 78(1) of the Act, if any of the circumstance prescribed under section 79 of the Act exists, the Rastra Bank may file an application to the court for mandatory liquidation of such bank or financial institution and notice of application of such action shall be published in a daily newspaper of national level. While filing the application for initiating the liquidation process, the Rastra Bank shall include following documents along with the application:

a) Details along with reasons for mandatory liquidation of the bank or financial institution that the situation referred to in Section 78 is prevailing,
b) Financial statement of the bank or financial institution.

As per section-78(3) of the Act, notwithstanding anything contained in section 78(1), any of the following persons also may, with prior approval of the Rastra Bank, file application to the court by mentioning the grounds to show the situation that a bank or financial institution may be subjected to mandatory liquidation pursuant to Section 79 :

a) Joint application of the depositors having representation of more than 25 percent of the total deposit, who do not get the payment of the payable deposits or of more than one percent of the depositors,
b) The person competent to file application for mandatory liquidation according to the prevailing law relating to insolvency.
c) In case the court orders for initiation of the process of liquidation of a bank or financial institution based on the application referred to in Sub-Section (1) or (3) of section 78, the process of mandatory liquidation of the bank or financial institution shall be commenced from the date of passing of such an order.

Question No. 8:

Newly appointed directors of Chandragiri Development Bank have submitted their disclosure to the bank following the Section 92 of the Companies Act, 2063. However the bank management denied taking these disclosures saying that directors of bank should follow the provisions of Bank and Financial Institutions Act (BAFIA), 2073 in this case. What are the differences between these two disclosures mentioned in Companies Act, 2063 and BAFIA, 2073? Explain.

[December, 2017](7 Marks) [December, 2014](5 Marks)

Answer:

As per the section 92 of the Companies Act, 2063 vide its First Amendment disclosure of a director is as follows:

A director shall, no later than fifteen days after assuming the office of director, disclose in writing to the company the following matters:

- If he/she or his/her close relative has direct involvement or any kind of personal interest in any kind of sale and purchase or other kind of contract related with the transactions of the company.
- If he/she has any kind of interest in the appointment of the managing director, company secretary, officer of the company
- If he/she is a director of any other company
- If he/she has made any dealing in the share or debentures of the company or of its holding or subsidiary company, about matters of such dealing.

In making such disclosure, a copy of the written agreement, if any, concluded between the company and the director or his/she close relative shall be submitted, and failing such agreement, substantial and necessary matters concerning the transaction or interest or involvement shall be set out.

The company shall submit to the Company Registrar's Office (Office) the information as referred to within seven days of the receipt of such information and upon receipt of information, the office shall record the same in separate register maintained for this purpose.

If any director has an interest directly or indirectly linked to any kind of contract, lease, transaction or agreement entered or to be entered with the concerned company or its subsidiary company or comes to his /her knowledge that such interest will be so linked, that director shall disclose that matter to the company promptly, setting out the extent and kind of such interest.

If any director gives written information to the company that he be considered to have his personal interest in a transaction with any certain person, that director shall be deemed to have disclosed his/her personal interest in any transaction or contract to be done or made with such person.

BAFIA 2073 has provided two sections regarding the disclosures of directors of any banks or financial institutions as follows which more expanded than the disclosures as mentioned in the section 92 of the company act.

Section 24 of BAFIA has provided to make complete records of the directors as follows:

- Name and address along with the education qualification. Also the profession and experience if any.
- Working as a director, executive officer or employee of any organization with his/her responsibility
- Description of the member of the family and if he or she has any kind of interest in the bank or shares in any organization
- Description of the shares or debentures of director or his/her family in the bank or in the subsidiary companies.

- If any member of his or her family is working as an officer of the bank or financial institution, details thereof;
- If he or she of any of his or her family members has entered into or going to enter into any kind of contract with the concerned bank or financial institutions, details thereof;
- If he or she has any kind of interest in the appointment of the chef executive, company secretary and auditor, details thereof;
- An authorized letter provided to Nepal Rastra Bank regarding the power of investigation of the director of the bank.
- Self-declaration by the director is being qualified to become director

Section 25 of BAFIA has provided more procedures regarding the disclosures and records of the particulars of directors as obtained by Section 24 of the same Act.

Every directors within seven days after their appointment as a director should submit their particulars pursuant to section 24 to the financial institution.

The bank or financial institution should maintained separate records of each directors in the bank. Hence the disclosure as mentioned in the section 92 of the company act is not fulfilled the total requirement of the disclosures of the director as appointed by the bank. The contention of the bank management is correct considering the provisions of BAFIA 2073.

Question No. 9:

What is the limit for extending loans and other credit facilities by A, B and C class banks and financial institutions to a single borrower or a group of borrowers having mutual interest as provided by Banks and Financial Institutions Act, 2063? What will be the consequences of not following the provisions as to such limit?

[June, 2016](4.5+0.5 Marks)

Answer:

Section 50(1)(d) of the Bank and Financial Institution Act, 2073 provides that a licensed institution should not provide loan or credit facilities exceeding certain a percentage of its capital fund prescribed by Nepal Rastra Bank to a single customer or a company or group companies or a partnership firm of the same group and relevant person.

Accordingly, Nepal Rastra Bank has prescribed such percentage in clause (1) of Unified Directives 2075. It states that "A", "B" and "C" class licensed institutions cannot offer fund based and non-fund based facilities exceeding 25% of its primary capital to a single customer, firm, company or a group of customers having mutual interest. However, the single customer limit for a loan to the priority sector of investment such as export sector, small and medium industries, medicine industries, agriculture industries, tourism industries, cement industries, iron industries and other manufacturing industries has been fixed at 30%. In case the group of customers includes industries and business that apply both type of limit, the limit of total loan and facilities must be 30%. The above percentage will be calculated on the basis of the latest quarterly financial statements certified by the internal auditor.

If any bank or financial institution gives credit facilities to any single customer or a group of customers exceeding the prescribed limit, in respect of such excess facilities over the prescribed limit, 100% loan loss provision should be made.

Question No. 10:

Explain how the meeting of board of directors of a bank is conducted, decisions are made and minutes are prepared?

[June, 2015](5 Marks)

Answer:

Section 21 of BAFIA, 2073 has explained the meeting of board of directors as follows**:**

1) Meetings of the Board of Directors shall have to be held at least 12 times in a year.
   Provided that gap between two meetings shall not be more than sixty days.
2) The chairperson shall convene a meeting of the Board of Directors at any time when at least one-third of the Directors request in writing to convene the meeting by mentioning the agenda to be discussed in the meeting.
3) Meetings of the Board of Directors shall be presided over by the Chairperson. In absence of the Chairperson, the meeting shall be presided over by a Director selected by majority of the Directors from amongst themselves.
4) No meeting of the Board of Directors shall be held unless it is attended by at least fifty one percent of the total number of Directors.
5) The decision of a majority in the meeting of the Board of Directors shall be binding and the chairperson may exercise the casting vote only in the event of a tie.
6) Minutes regarding the names of Directors attend in the meeting of Board of Directors, the agenda discussed and the decisions taken thereon shall be recorded in a separate book, and such minutes shall be signed by all Directors attended in the meeting.
   Provided that, if any Director puts forward any dissenting opinion in the decision of the Board of Directors, he/she may mention such dissenting opinion in the minutes by putting own signature.

Question No. 11:

Capital fund and risk bearing fund

[June, 2015](5 Marks) [June, 2013](5 Marks) [December, 2009](5 Marks)

Answer:

i. Capital fund:

As per section 2(y) of Bank & Financial Institution Act 2073, capital fund means "Capital Fund" means the total sum of primary capital and supplementary capital of a bank or financial institution as specified by the Rastra Bank and the term also includes other fund or amount as specified by the Rastra Bank from time to time.

Section 42 of Bank & Financial Institution Act 2073 prescribes about the capital fund as follows:

1) A bank or financial institution shall have to maintain a capital fund in the ratio as prescribed by the Rastra Bank on the basis of its total assets or total risk-weighted assets. The Rastra Bank may, while prescribing such ratio, also prescribe the ratio of additional capital fund.
2) If any bank or financial institution fails to maintain the capital fund in accordance with Sub-Section (1), the Board of Directors of such bank or financial institution shall have to give information thereof to the Rastra Bank within one month.
3) The information given pursuant to Sub-Section (2) shall also be accompanied by, *inter alia*, the reasons for the failure to maintain the capital fund and the plans or programs prepared by the Board of Directors to increase the capital fund and restore it to the position as prescribed by the Nepal Rastra Bank.
4) On receipt of the information referred to in Sub-Sections (2) and (3), if the Rastra Bank deems the plan or program submitted by the Board of Directors reasonable, it may give directive to the concerned bank or financial institution to implement such plans or programs; and if any amendment or alteration is to be made in the proposed plans or programs it may give a direction to the concerned bank or financial institution to amend or alter such plan or programs stating the reasons for such amendment or alteration, and to implement the same.

ii. Risk-bearing fund:

A licensed institution shall maintain a risk-bearing fund in the proportion prescribed by the Rastra Bank in such a manner that it can cover the liability relating to its total assets and off-balance sheet transactions.

The "Risk Reserve Fund" is maintained to meet the losses of loans due to non-recovery. Under section 43 of the Bank & Financial Institution Act, 2073, the fund is created in terms of the directives issued by the Nepal Rastra Bank in view of the total assets & off balance sheet transactions.

Question No. 12:

What are the financial transactions a "D" class financial institution may carry?

[December, 2013](5 Marks)

Answer:

As per section 49 (4) of the Banks and Financial Institutions Act 2073, the Class "D" financial institution may carry on the following banking and financial transactions subject to this Act, Memorandum of Association and Articles of Association and limitation, conditions imposed and direction issued by the Rastra Bank:

a) To Disburse micro-credit, with or without any movable or immovable property as the collateral or security, for operating any micro-enterprise prescribed by the Rastra Bank to any project, any group or a member thereof which/who have regularly saved for the period and maintained the prescribed saving,
b) To accept loans or grants from any bank or financial institution or native or foreign organization or institution, and use such loans or grants for the supply of micro-credit or for making the same effective.
Provided that approval of the Rastra Bank shall be obtained prior to obtaining loans or grants from any foreign organization.
c) Prior to disbursing micro-credits, evaluating the schemes for which micro-credits have been requested and determining whether or not they are feasible,
d) To provide necessary services and consultation to groups with regard to mobilization of micro finance,
e) To carry out necessary actions for recovery of the micro credits on time,
f) To accept deposits and refund such deposits subject to the limit prescribed by the Rastra Bank by getting approval of the Rastra Bank,
g) To issue shares, debentures, bonds, etc. for the purpose of meeting the capital fund requirements,
h) To exchange information or notices on debtors or customers who have obtained credit or any kind of facility from it and other bank or financial institutions with the Rastra Bank or any other bank or financial institutions particulars of,
i) To carry out such other functions as may be prescribed by the Rastra Bank.

Question No. 13:

Explain the various activities which are prohibited for being carried out by a commercial bank or financial institution under the Bank and Financial Institutions Act, 2063.

[June, 2013](5 Marks)

Answer:

Section 50 of Bank and Financial Institution Act, 2073 has prescribed about following various activities which are prohibited for being carried out by a commercial bank or financial institution:

1) A bank or financial institution shall not have to carry out or cause to be carried out any of the following acts:-
a) To purchase and sell goods with an objective of business and to purchase immovable land and to construct building except those are necessary for its own purposes,
b) To disburse credit against security of one's own shares,
c) To provide any type of credit facility to the Directors, person having subscribed one percent or more than that of the paid up capital, Chief Executive, or a member of family of such persons, or the firm, company or organization having significant ownership or

financial interest in any person, firm, company or organization having authority to nominate or appoint Director or managing agent,

d) To provide any type of credit or facility exceeding per customer limit prescribed by the Rastra Bank from its capital fund to the single customer, company, companies or partnership firms of the same group and relevant person,
e) To provide any type of credits to any person, firm, company or institution on the guarantee of promoters, Directors, or Chief Executive,
f) To make investment in the securities of the bank or financial institutions of class "A", "B" and "C", classified by the Rastra Bank,
g) To invest the amount more than the limit as prescribed by the Rastra Bank in share capital of other institution,
h) To create any type of monopoly or other type of restrictive practices in banking and financial transactions in collusion of banks or financial institutions,
i) To commit in any act to create an artificial hurdles in competitive environment in financial sectors with a intention to get undue advantage,
j) To carry out any other functions which are prescribed by the Rastra Bank as the functions not be carried out by a bank or financial institutions.

2) Notwithstanding anything contained elsewhere in this Act, there shall be no restriction to carry on own banking and financial transaction or to provide housing or other facilities for its own employees according to prevailing Personnel Byelaws of bank or financial institution, to disburse any credit against the collateral security of the bond issued by Government of Nepal or Rastra Bank, amount deposited in any account or fixed deposits receipts or to make available credit and credit card facilities up to the prescribed limit to promoters, Directors, Chief Executive or shareholders having subscribed more than one percent of shares against the collateral security of their own fixed deposit receipts, and the bonds issued by Government of Nepal or the Rastra Bank.

Question No. 14:

Limi Finance Ltd, a 'C' class registered financial institution is constantly making profit for the last three years. It wants to upgrade to class 'B'. Answer the following questions

i) What are the legal provisions as to upgrading financial institutions?
ii) Is it legally possible to upgrade?

[June, 2013](5 Marks)

Answer:

i. As per section 38(1) of BAFIA 2073, if a bank or financial institution of lower class desires to be converted into a bank or financial institution of one level higher class, it has to submit an application to the Rastra Bank.
Provided that the class "D" institutions may not be converted into the higher class.

As per section 38(1) of BAFIA 2073, if the Rastra Bank deems appropriate, upon carrying out inquiry into the application and details enclosed with the application according to Sub-Section (1), to convert bank or financial institution as the bank or financial institution of higher class, it may grant prior approval subject to the following terms and conditions:-

a) If it has met the paid up capital requirement for a bank or financial institution of higher class as prescribed by the Rstra Bank,
b) If it has continuously maintained the capital fund adequacy according to the Rastra Bank directives for the last five years, it is in profit continuously for the last five years, and the average non-performing loans of the last five years is within the limits as prescribed by the Rastra Bank,
c) If preliminary expenses have already been written off,
d) If the shares to be issued publicly have been issued and already been allotted,
e) If the General Meeting has already passed the special resolution for conversion into upper class of the bank or financial institution,
f) If it has met all conditions as prescribed by the Rastra Bank,

As per section 38(3) of BAFIA 2073, the Rastra Bank shall issue the license of upper class bank or financial institution pursuant to this Act causing amendment to be made to the Memorandum of Association and Articles of Association of the bank or financial institution according to prevailing law having obtained prior approval pursuant to Sub-Section.

ii. One of the pre-requisites for upgrading a financial institution is to prove that the institution is constantly making profit for the last 5 consecutive years as per section 38(2)(b) whereas Limi Finance Ltd is in profit only for the last 3 years. Hence, it's not possible to upgrade.

Question No. 15:

Sisne, Ratanbara and Chitre, the three district level development banks of different locations are interested to merge each other to be a national level development bank in Nepal. However, all three are unaware of the concept of the merger and hence request you to suggest them the right procedure. You as a consultant, advise the management of these three development banks considering the provisions of the relevant Acts including BAFIA, 2063.

[December, 2012](5 Marks)

Answer:

Section 69 of BAFIA, 2073 prescribes about the merger of banks/financial institutions as follows:

1) One bank or financial institution may be merged with another bank or financial institution or one bank or financial institution may acquire another bank or financial institution by fulfilling the procedures prescribed by this Act and the Nepal Rastra Bank Act.
2) A class "D" financial institution may be merged with or such institution may acquire another institution of the same class.

   Provided that, an infrastructure development bank and a bank or financial institution may not be merged into each other and none of them may acquire the other.

3) Notwithstanding anything contained elsewhere in this Chapter, in case any of the following circumstances is found from an Inspection and Supervision Report of the Rastra Bank, the Rastra Bank may order such bank or financial institution or any of its assets, liabilities, or business to merge or be merged into another bank or financial institution:-
    a) Capital fund is inadequate or financial position has been deteriorating for last three years,
    b) An act causing adverse effect on depositor's interests and liabilities towards depositors or such situation is prevailing,
    c) It is necessary to enhance the competitive capacity at national and international level for stability, development and promotion of the financial system of the state.
4) Notwithstanding anything contained elsewhere in this Chapter, in case any of the following circumstances is found from an Inspection and Supervision Report of the Rastra Bank, the Rastra Bank may order such bank or financial institution to acquire or cause to be acquired another bank or financial institution, having stated the reasons thereof:-
    a) In case more than one bank or financial institution belonging to single group of persons, firms and companies are in operation and there is unhealthy financial relation,
    b) In case rights and interests of the depositors, ordinary shareholders, and other costumers could not be protected due to the negative impact, if the bank or financial institution is operated in the status quo,
    c) System-based risks are increased and the licensed institution is unable to pay its liabilities,
    d) In case shares have not been issued in the ordinary group within the prescribed time, the issued shares have not been sold or subscribed, or the prescribed minimum proportional paid up capital has not been met,
    e) In case a bank or financial institution is subjected to actions of rapid reforms for three times or more or good governance has become weak due to arising of frequent disputes in the Board of Directors of the bank or financial institution.
5) While issuing order by the Rastra Bank pursuant to sub-Section (3) or (4) for merger or acquisition of bank or financial institutions, it may specify the procedures thereof in such order.

Question No. 16:

A group of people of Sanfejung are interested to establish a 'B' class development bank in Ilam. However, they are unaware of the procedures of the Act. You as a legal expert, advise the group regarding the procedures of getting license to carry on financial transactions in Ilam as a development bank of one district.

[Final/December, 2012](5 Marks)

Answer:

BAFIA Act, 2073 has defined the procedures of establishing a financial institution.

As per section 33 of BAFIA 2073, any person, who is desirous of incorporating a bank or financial institution to carry on financial transactions according to this Act shall have to incorporate it by getting such bank or financial institution registered as a public limited company in accordance with the prevailing laws.

For incorporating a public company, the person or institution willing to incorporate a bank or financial institution under Section 3 shall, while submitting application for getting such bank or financial institution registered according to the prevailing laws, have to submit an application to the Rastra Bank along with the prescribed fee for obtaining prior approval having enclosed therewith the following documents [u/s 4(1)]:-

a) Memorandum of Association of the proposed bank or financial institution,
b) Articles of Association of the proposed bank or financial institution,
c) Feasibility study report of the proposed bank or financial institution,
d) Personal details of applicants in the form as prescribed by the Rastra Bank,
e) A certified copy of the agreement, if any, made between the applicants prior to incorporation of the bank or financial institution in relation to incorporation of the bank or financial institution,
f) Evidence of the statement disclosing the sources of incomes and of tax clearance by the applicants up to the fiscal year immediately preceding for making of application pursuant to this Section,
g) Details as to whether or not the applicant of the proposed bank or financial institution is declared bankrupt in Nepal and abroad, whether or not he/she has borrowed any loan from any bank or financial institution, whether or not person has been blacklisted in any transaction with a bank or financial institution, if so, whether or not a period of three years is passed after having such blacklisting,
h) Self-declaration of the applicant stating that no action has been taken and no punishment has been imposed against the applicant in Nepal or abroad for being involved in cheating, fraud or criminal offence as per the prevailing laws,
i) Details as to whether or not action has been taken against the applicant in Nepal or abroad by any regulating or supervisory authority or whether or not license of the company or bank or financial institution in which he/she is associated with has been suspended, revoked or subjected to mandatory dismissal or is in the course of being so,
j) Details as to name and address and relationship of the members of family of applicant; significant ownership and capacity of each of them and if any of them is a Director, official or employee in any institution, details as to the title of posts each of them holds,

   Provided that in case the applicant is a body corporate, details as to the person having substantial ownership or capacity in that body corporate, the audited financial statements of the last three years as well as the tax clearance certificate of that corporate body shall also be enclosed.

k) Written authority given to the Rastra Bank to allow it to conduct or to cause to conduct an inquiry as to the financial and professional background of the applicant and to share such notice and information,
l) An undertaking that the deposits to the limits as prescribed by the Rastra Bank will be guaranteed/insured,
m) Other details or documents as specified by Rastra Bank from time to time.

As per section 4(2) of the Act, Rastra Bank may, if it finds appropriate to grant approval upon the examination of the application submitted for prior approval pursuant to Sub-Section (1) and enclosed documents, grants it prior approval to incorporate such bank or financial institution within one hundred twenty days after filing of the application, with or without prescribing any conditions.

After incorporation as a public company, as per section 33 of the Act, the financial institution shall make an application to the Rastra Bank for obtaining license with fee as prescribed by the Rastra Bank [u/s 33(1)].

The bank or financial institution shall also enclose following details and documents with the application to be made pursuant to Sub-Section (1) [u/s 33(2)]: -

a) A copy of the Memorandum of Association, Articles of Association of the bank or financial institution along with the certificate of incorporation according to the prevailing laws,
b) Particulars of an office building equipped with all infrastructures required by the bank or financial institution to carry on financial transactions, or, if such building is to rented, a copy of the lease agreement and the particulars of the building to be rented, including that there are enough bases for making available banking and financial services and facilities,
c) Document evidencing that the amount of the shares undertaken to be subscribed by promoters is paid and deposited to the Rastra Bank,
d) Byelaws Relating to Conditions of Service and Facilities of the Employees, Financial Administration Byelaws; and Bye-laws relating to Write-off of Loans of the bank or financial institution,
e) Principal place of business or if address of the branches have been ascertained, address thereof,
f) Consent that the terms and conditions set forth by the Rastra Bank for carrying out banking and financial transaction will be abided by,
g) Business plan prepared by incorporating business strategy of the bank or financial institution, organizational structure suitable to nature of the transaction to be operated, internal control and risk management process,
h) Name-list of the Directors and officials of the bank or financial institution and details stating that they are qualified to become the Director and officials according to this Act,
i) Commitment to meet the minimum capital adequacy ratio set by the Rastra Bank from time to time until the bank or financial institution carries on banking and financial transactions,

j) Commitment that the bank or financial institution will maintain an internal control system for proper management of all potential risks,
k) Other details and documents specified by the Rastra Bank from time to time.

The Rastra Bank may, if any documents or details are not adequate or sufficient while carrying out enquiry to the documents and details received pursuant to Sub-Section (2) or (3), ask for additional documents or details from concerned bank or financial institution.

As per section 34, in case the Rastra Bank finds, while carrying out inquiry on the application submitted pursuant to Section 33 and documents and details enclosed therewith, that all requirements to carry on the banking and financial transaction under this Act are met, the Rastra Bank may issue license of any class based on the classification of bank or financial institution pursuant to Section 37 within one hundred twenty days to operate banking and financial transaction with/without mentioning conditions.

Question No. 17:

Core Capital

[June, 2007](5 Marks) [Final/June, 2010](4 Marks) [Final/June, 2012](4 Marks)

Answer:

As per section 2(cc) of Bank and Financial Institution Act 2073, Core Capital means the total balance amount of any bank or financial institution's Paid up capital, Share Premium, Non-redeemable Preference Share, General Reserve Fund and Retained Earnings or Loss and the term also means the balance amount of other account heading as specified by Nepal Rastra Bank from time to time.

However, as per clause 3(1) of Unified Directive No. 1 issued by Nepal Rastra Bank 2075, following items must be deducted from the total amount of the above mentioned items while calculating Core Capital for the purpose of Capital Reserve.

i. Book value of goodwill
ii. Deferred tax assets
iii. Investment in corporate shares and debentures in excess of the limit prescribed by Nepal Rastra Bank.
iv. Total investment in shares and debentures of corporate sector having financial interest.
v. Loan and facilities provided to the person and group prohibited by this Act and prevailing law
vi. Fictitious assets. However, expenses incurred in research, development and computer software shall not be considered while calculating fictitious assets.
vii. Amount of land building acquired for own purpose in violation of directive issued by Nepal Rastra Bank until it comes within the limit as prescribed.
viii. Amount of investment made in residential building and real estate in excess to the limit.

ix. Share guarantee failed to allot within the prescribed time limit.

Question No. 18:

Nowadays blacklisting has been used as a coercive weapon by a regulator to the willful defaulter of a bank due. On the part of prospective investors it is also a disincentive. On the above backdrop answer any THREE Questions of the followings.

a. What is blacklisting?
b. Point out the conditions for blacklisting?
c. Who will be blacklisted?
d. What is the procedure for the removal from blacklisting?

[Final/June, 2010](3×5=15 Marks) [Final/June, 2010](3×5=15 Marks) [Final/June, 2011](5 Marks) [Final/June, 2012](3×5=15 Marks)

Answer

a. Blacklisting is used as a coercive weapon by the regulator to the willful defaulter of bank due. In Nepal, this is a list maintained by the Credit Information Bureau on the basis of information provided by bank and financial institutions under the provision of directives issued by Nepal Rastra Bank (NRB) and the NRB Act. The objective of the list is to pressurize the defaulter for payment to the bank and provide the information to the needy person about the defaulter of the bank debt. This Bureau was established by the Nepal Banker's Association and now recognized by NRB. According to section 88 of the NRB Act 2058, following are the functions of Credit Information Bureau;
   a. To obtain information on the flow of credit from commercial banks and financial institutions in order to ensure fairness and appropriateness in credit flow.
   b. To require the exchange of the information received pursuant to Clause (a) above amongst the commercial banks and financial institutions for the purpose referred to in that sub-section.
   c. To require to send the name-list of the debtors not repaying the loan in time or misusing the loan to the Bureau.
   d. To require to obtain on compulsory basis the information from the Bureau prior to making investment or advancing loan of an amount more than the limit prescribed by the Bank.
   e. To have the name-list received pursuant to clause (c) blacklisted by the Bureau upon confirmation, and to take necessary action in this regard.
   f. To submit report of the Bank, on the exchange of information among the commercial bank and financial institution and use such information while making loan investment on the basis of inspection, supervision and monitoring.
   g. Thus, the Bureau receives information regarding default from different bank and financial institutions to prepare the blacklist. NRB by using its statutory authority has issued the directives relating the blacklisting of defaulter and person involved in the financial crime.

b. Conditions of Black Listing

There are various conditions stated in the NRB directives, 2075 and the NRB Act, 2058 and the Banks and Financial Institutions Act, (BAFIA) 2073. Generally, following are the conditions for Blacklisting by the Bureau to any debtor who has received two and half million and above loan and advance from any banking company:

- If the date of payment of the principal or installment of principle or interest exceeds one year.
- If the misuse of loan and advance is proved.
- If misuse of collateral property by the debtor is proven.
- In case of disappearance of debtor.
- If the debtor is declared as insolvent under the prevailing law.
- In case of non-recovery of the entire amount even after the completion of the court procedure regarding the recovery.
- In case it is proved by the court that the person is involved in forgery or attempt to forgery of negotiable instrument, currency or electronic cards.
- If involvement of a person, firm, company, or corporate body in such case is proved.
- In case of dishonour of cheques for not having sufficient balance in account.

In the case of non-willful defaulter the Board of directors of respective bank or financial institutions can decide otherwise, if there is request from the debtors in this regard. Bank can renew or restructure the loan for such non-willful defaulter in order to save them from being black listed.

c. The BAFIA, 2073 does not make detailed provision as regards to the person to be blacklisted. It is limited only to the person, firm, company, which default the loan or advance facility provided by the bank and the guarantor of such loan or advance. But the NRB Directive number 12 of Unified Directives, 2075 issued by Nepal Rastra Bank makes clear provision in this regard. According to this directive, in any or all of the above-mentioned conditions, the concerned bank or financial institution has to send a letter to the Credit Information Bureau accompanying the particulars of the defaulted loan. After verifying the particulars provided by the bank or financial institution, the Bureau will decide to include the names of the following;

- Person, firm, company, or corporate body, which is using the loan or advance.
- Proprietors of any business firm.
- Partners of any partnership firm.
- Guarantor of loan and advance given to any person, firm, company, or corporate body.
- Board of directors of company or corporate body.
- Shareholders having fifteen percent and above share ownership and person, firm, company or corporate body having right to appoint the director.

- Any director and or chief executive officer of the firm, company or corporate body wherein fifteen percent and above share is under the ownership of black listed person, firm, company, or corporate body.
- Any firm, company or corporate body where the person blacklisted or his representative is a director.
- Person, firm, company, or corporate body from which categories are made by NRB on the basis of their relation as a single group.
- Any guarantor of the customer.
- The heir, which accepts the inheritance of the deceased debtor but does not fulfill his liabilities.

d. Removal from the Black Listing

The NRB Directive number 12 of Unified Directives, 2075 issued by Nepal Rastra Bank makes provision for the removal from the black list maintained by Credit Information Bureau. Bank and financial institutions can write the Credit Information Bureau to remove the name of any person, firm, company, or corporate body from the black list maintained by the later in the following conditions:

- in case of payment of principal and interest of debt.
- In case of extension of the time of loan by the board of director of licensed institution or restructure or reschedule of the loan.
- In case of payment of own part by any debtor of loan where the debtors are more than one.
- In case of acceptance of liability by other person, firm, company, or corporate body with the permission of the board of directors of the banking company.
- In case of non-willful defaulter banking company can provide six months time for the payment if board of director decide to do so.

After receiving the letter from the respective bank and financial institution to remove the name of any person from the black listing stating any of the above mentioned conditions the Bureau will remove the name of such person, firm or company from its blacklist. In addition to these conditions, any person, firm or company can be removed from the black list of the Bureau by order of the court. The court gives order for the removal from the black listing, which is maintained illegally or without fulfilling the requirements determined by law.

Question No. 19:

What are the provisions in the Bank and Financial Institutions Act, 2063 for a ban on the payment of dividends to the shareholders based on the capital structure?

[June 2012](5 Marks)

Answer:

Section 47 of Bank and Financial Institution Act, 2073 prescribes about the declaration as distribution of dividend as follows:

1) A bank or financial institution shall have to obtain approval of the Rastra Bank before declaring and distributing dividends.
2) No bank or financial institution shall be allowed to declare or distribute dividends to its shareholders until it recovers all of its preliminary expenses and the losses sustained by it until the previous year, capital, capital fund and possible loan loss provisioning as prescribed by the Rastra bank and for general reserve fund pursuant to Section 44 and until complete sale of shares to be allotted to general public.

Hence, at afore stated provisions, Nepal Rastra Bank may impose a ban on the payment of dividends to the shareholders based on the capital structure.

Question No. 20:

Sunshine Bank Ltd. has nine directors inclusive of one independent professional director. Advise whether the Bank complies BAFIA and Companies Act, 2063 clearly stating the provision regarding formation of the Board and number of directors?

[December, 2011](5 Marks) [June, 2011](5 Marks) [June, 2004](5 Marks)

Answer:

i. Board of Directors as per BAFIA, 2073:

Section 14 of BAFIA, 2073 prescribes about the formation of board of directors of a licensed institution as follows:

1) A bank or financial institution shall have a Board of Directors comprising of at least five Directors and not exceeding seven Directors.
2) Subject to this Act and the Articles of Association, the General Meeting of the bank or financial institution shall appoint Directors.

   Provided that,-

   a) Until the First Annual General Meeting of the bank or financial institution is held, promoters shall appoint the Directors.
   b) In case the position of any Director falls vacant before the holding of the Annual General Meeting, the Board of Directors may appoint Director until next General Meeting is held.
   c) In case any corporate body has subscribed shares, it may appoint Director to the proportion of the number of shares it has subscribed and while nominating in such a manner, the same person shall not be nominated to more than one bank or financial institution.
   d) Notwithstanding anything contained in Part (c), there shall be no obstruction to appoint a person, who is Director in any bank or financial institution as Director of an Infrastructure Development Bank.

3) The Board of Directors shall appoint at least one Professional Director from among the persons possessing qualifications and experience pursuant to Section 17 and information thereof shall be furnished to the First General Meeting to be held after such appointment. Provided that the promoter, Director or shareholder possessing more than 0.1 percent share of the bank and financial institution and his/her member of family shall not be allowed to become a Professional Director.
4) Notwithstanding anything contained in Sub-Section (1) and (3), no more than one member of a family may become the Director of any bank or financial institution at the same time.
5) A Director chosen by the Directors from among themselves by majority decision shall be the Chairperson of the Board of Directors.
6) The company, corporate body, foreign bank or financial institution which has subscribed shares of a bank or financial institution may, while appointing a director proportionate to the shares as it has subscribed, appoint an Alternate Director to work in absence of the Director.

ii. Board of Directors as per Companies Act, 2063:
Section 86 of the Companies Act, 2063 with first amendment 2074 prescribes about the formation of board of directors and number of directors as follows:
1) The appointment and number of directors of a private company shall be as provided in its articles of association. However, such number shall not exceed 11.
2) Every public company shall have a board of directors consisting of a minimum of three and a maximum of eleven directors.
Provided that a public company having female shareholders shall include atleast one female director
3) In forming the board of directors pursuant to sub-section (2), at least one independent director, in the case of the number of directors not exceeding seven, and at least two independent directors, in the case of the number of directors exceeding seven, shall be appointed from amongst the persons who have the knowledge as prescribed in the articles of association of the company and gained knowledge and experience in the subject related with the business of the company concerned.
4) Any one director selected by the directors from amongst themselves shall be the chairman of the board of directors.

Considering the above mentioned provisions, we can conclude that the Bank has not complied with BAFIA, 2073 which is special law for it. Son, as the number of directors is nine it is suggested to reduce 2 to 4 non-independent directors limiting its maximum number to 7.

Question No. 21:
What are the disqualifications of directors under the BAFIA, 2063?

[December, 2011](5 Marks) [June, 2011](5 Marks)

Answer:

Section 18(1) of BAFIA, 2073 prescribes about disqualification of directors. According to it any of the following persons will not be eligible to be elected or nominated to the office of, or continue to hold the office of, a director:

a) Having not attained the age of 25 years,
b) Having unsound mind or insane,
c) Having declared bankrupt in Nepal or in abroad for being unable to pay debt,
d) Having blacklisted or declared defaulter in connection with any transaction with any bank or financial institution in Nepal or in abroad, and a period of at least three years has not been completed after removal of his\her name from blacklist or list of defaulter,
e) The incumbent Director or an employee of any corporate body carrying out transactions of bank or financial institution or any institution collecting any type of deposits or carrying out transactions relating to insurance,
f) Borrower or incumbent auditor or advisor of concerned bank or financial institution or the person, firm or company who/which is the partner in any kind of contract with the concerned bank or financial institution or having personal interests,
g) Who has acquired membership of the Stock Exchange to act as a securities broker of merchant banker,
h) Incumbent Director of the bank or financial institution,
i) The person, who has not subscribed to the minimum number of shares required to be subscribed to be eligible for appointment as a Director pursuant to the Articles of Association of the bank or financial institution,
j) Incumbent employee of Government of Nepal, or an organization having ownership of Government of Nepal, or Rastra Bank or of a bank or financial institution,
   Provided that this provision shall not be deemed to have made obstruction to nominate Director in micro-finance or infrastructure development bank, of which share has been purchased by Government of Nepal or the institution having under the ownership of Government of Nepal or Rastra Bank or bank or financial institution.
k) Who, having a liability to pay tax pursuant to the laws in force, has failed to pay the same
l) Having not completed a period of ten years after replenishment of punishment upon being convicted of an offence of theft, cheating, forgery, fraud, corruption, any offence involving moral turpitude or a banking offence from a court of Nepal or of a foreign country,
m) Having been taken action by a regulatory agency as per law for committing an act against law and not having completed a period of five years after being taken such action,
n) In case of an independent director, promoter or shareholder holding ownership of more than 0.1 % share of concerned bank or financial institution,
o) Having remained to clear imprisonment and dues of fine as imposed by the court or having defaulted to pay government due.

As per section 18(2), notwithstanding anything contained in Part (e) of Sub-Section (1), an official or employee of a bank or financial institution may work as a Director of the subsidiary company of the same bank or financial institution.

Question No. 22:

Nabraj Kunwar is a chief accountant of a commercial bank listed on the stock exchange. Whilst drawing up the annual accounts, Nabraj knows that the bank has made a better profit than expected. On the basis of that knowledge, he buys shares of the bank before the good results are announced. He makes a substantial profit on the share dealing. Nabraj also discloses the fact to his friend Dinesh Bharati before they are announced. Dinesh also buys shares of the bank. Whether Nabraj and Dinesh have committed any immoral act? Explain how these problems are tried to control under the prevailing law of Nepal?

[December 2011](10 Marks)

Answer:

The stock market value of shares in a company fluctuates according to the underlying performance of the company and the expectations of investors. Amongst other things, good company results will lead to an increase in the value of the shares. Since share prices fluctuate on the stock market, the possibility arises for individuals to make large profits, or losses, by speculating in shares. It can also provide people with the opportunity to take advantage of their close relationship with particular companies, in order to make profits from illegal share dealing. Such illegal trading in shares, known as insider trading, occurs when someone trades on the basis of price sensitive information before the general public has access to that information. Insider trading is illegal and restricted activity. It is a trading of securities by individuals with potential access to non-public information about the company, in breach of a fiduciary duties or other relationship. It is a violation of trust confidence or misappropriation of information. In other words insider dealing refers to the improper use of price sensitive information in respect of listed securities by a person for private gain. This principle has been adopted in the BAFIA 2073, Companies Act, 2063 and Securities Act, 2063.

Section 12 of BAFIA 2073 restricts, during the tenure and a year after the tenure expires, the Director, CEO, auditor, accounting and management and their family member to deal in securities of his company or its subsidiaries and of companies controlled by him or his families. The Act further prescribes that if any person does any act in contravention to above act the concerned bank or financial institution can forfeit such securities and the Board may sell and dispose off the securities forfeited as it may think appropriate.

Securities Act, 2063 Section 91 prescribes insider trading as if any person deals in securities or causes any other person to deal in securities on the basis of any insider information or notice that are unpublished or communicates any information or notice known to such a person in the course

of discharge of his or her duties in manner likely to affect the price of securities such a person shall be deemed to have been committed an insider trading in securities. It further explains that insider information or notice means any such specific kind of information or notice not published by a body corporate issuing any securities as may be capable of affecting the price of such securities if such information or notice is disclosed. Section 92 of the Act prescribes the provision regarding the persons likely to be involved in insider trading as those who have access to the insider information or notice not published by any body corporate such as: director, employee, a person, who can obtain any information or a notice in the capacity of a shareholder of that body corporate, professional and other having direct or indirect contact with the person or source above. Section 93 of the Act prescribes regarding the public notice or information. According to it information or notice deemed to have been made public if information for the benefit of investors in general or all to a particular group is given or information given or available as per laws and regulation. According to the Securities Act, 2063 false transaction, artificial up and downs in prices, unnatural influence to stock exchange, cheating statistics, conspiring transactions or hiding or destroying particulars are punishable under Section 94 to 100.

To control the insider trading practices section 92 of The Companies Act, 2063 First Amendment 2074 has prescribed that a director within 15 days of assuming office has to disclose in writing to the company, if he has any dealing or transactions in share or debenture of the company or its holding or subsidiary company, details of such transaction and so does under section 94 of the Act. If any director or concerned officer does not submit it, he/she may be punished with fine from Rs twenty thousand to fifty thousand or imprisonment upto two years or both.

In the given issue it is clear that there is insider trading on the part of Nabraj as well as Dinesh under Section 91 of Securities Act, 2063, and also under Section 11 of BAFIA. In this case the Bank can forfeit their shares as per Section 11(2) of BAFIA.

Question No. 23:

Discuss the conditions when there are possibilities of downgrading a bank by the Central Bank

[December, 2009](10 Marks) [Final/June, 2011](5 Marks) [June, 2005](5 Marks)

Answer:

This downgrading provision has not been incorporated expressly in BAFIA, 2073.

Question No. 24:

Allotment of Shares by banks and financial institutions.

[June, 2010](5 Marks) [December, 2006](10 Marks)

Answer:

Section 9 of Bank and Financial Institution Act, 2073 prescribes about the allotment of shares as follows:

1) The bank or financial institution shall set aside at least thirty percent share of its total issued capital for subscription by the general public.
   Explanation: For the purpose of this section, "general public" means natural person.
2) The shares allotted to general public pursuant to Sub-Section (1) shall be sold to the general public within the stipulated time. The shares that could not be sold in such a manner may be sold to other firm, company or institution.
3) The bank or financial institution may allot 0.5% shares, except that of the limit referred to in Sub-Section (1), to its employees.
4) The bank or financial institution may, if it desires, convert the shares to ordinary shares having fulfilled the process specified by the Rastra Bank subject not to be the share ownership of the promoter shares group less than 51 percent.
   Explanation: For the purpose of this Chapter,-
   "Promoter shares group" means the promoter shares group as prescribed by the Rastra Bank.
   "Ordinary shares group" means the shares groups other than the promoter shares group.
5) Notwithstanding anything contained in Sub-Section (1), the ratio of share ownership is not necessary in case of the bank or financial institution and infrastructure development bank to be incorporated under significant ownership of Government of Nepal.
6) The bank or financial institution to be incorporated in joint venture with a foreign bank or financial institution or other foreign institution or infrastructure development bank shall have to allot the shares to general public as specified by the Rastra Bank.
7) While call upon application from the general public for subscription of its shares, every bank or financial institution shall demand payment of hundred percent amount of the face value of its shares along with application.

Question No. 25:

Sulaxmi Commercial Bank wants to get acquisition of Kuber Finance Company, which the later agrees. As a corporate consultant advise them in the following issues as per the Banks and Financial Institutions Act, 2073:

i. What legal procedure these two financial entities have to follow for getting consent on principles of Nepal Rastra Bank (NRB) to such acquisition?
ii. Under what circumstance(s) NRB may give consent on principles to continue the proceedings of acquisition of the finance company?
iii. Under what grounds NRB may grant its final approval for such acquisition?

[June, 2010](2+1+4=7 Marks)

Answer:

i. If Sulaxmi Commercial Bank want to get acquisition of Kuber Finance Company and the later agrees to that, in that case both the Financial Entities shall adopt a special resolution to that effect in their respective general meetings and get a decision thereof from their respective Board of Directors, and make a joint application setting out the following matters for getting consent on principles of Nepal Rastra Bank (NRB) pursuant to section 70(2) of the Banks and Financial Institutions Act (BAFIA), 2073:

a) Necessity and justification of acquisition of the finance company, and the general impact therefrom on the banking and financial sector and the financial system,
b) Audit report including balance sheet, statement of income and expenditure, cash flow, net worth and the like of the last fiscal year of the Sulaxmi Commercial Bank and the Kuber Finance Company,
c) Details of the personnel management of Sulaxmi Commercial Bank and Kuber Finance Company,
d) Approval proceeding under the prevailing Companies and Securities laws
e) Preliminary agreement of acquisition of the finance company.
f) Other matters as are prescribed by NRB.

ii. Upon receiving such joint application for acquisition of the Kuber Finance Company, NRB shall examine the documents so filed, and then may give its Consent on Principles for such acquisition pursuant to section 70(4) of this Act, if it feels satisfied that the acquisition of the finance company is not likely create an adverse impact on the country's banking and finance development, on the environment of healthy competition, and in the compliance of the prevailing laws of the country.

iii. After obtaining NRB's Consent on Principles for acquisition, the applicants are required to cause uptodate valuation of their assets, liabilities and turnover on the set parameters of NRB pursuant to section 71(2) through (7) of this Act. Thereafter, the Parties of acquisition are required to conclude an agreement between themselves containing suitable arrangement of the following matters pursuant to section 72 of this Act:

a) arrangement of protection of interests of depositors, creditors and shareholders,
b) valuation method and adjustment arrangement of the assets and liabilities of the Applicant Bank and Financial Company,
c) matters like management of investment and transaction, inter-corporate ownership and transaction, details of guarantee and undertaking, management of non-banking transactions, adequate arrangement of assets and liabilities,
d) process, time frame and cost to be involved for such acquisition,
e) structure of operation and management and name list of directors,

f) arrangement and adjustment of job levels, service conditions of the concerned entities of acquisition,
g) details of substantial shareholders and other shareholders,
h) stakeholders' grievance management method
i) prevailing law and the process for its compliance
j) Such other necessary matters as are prescribed by NRB.

The Bank and Finance company obtaining NRB's Consent on Principle for acquisition are further required to get a special resolution passed by their respective general meetings and submit a copy of it alongwith a copy of agreement concluded under section 72 as above and file a joint application to NRB seeking its final approval for such acquisition.

NRB thereafter cause a thorough examination of that joint application for acquisition and may grant final approval for such acquisition setting certain terms and conditions if and/in case such acquisition shall not likely create an environment of unhealthy competition or give rise to the monopoly or controlled practice of any financial entity in the financial sector, and if there is no possibility of causing any serious impact on the whole structure of banking and finance, and the financial market and the depositors pursuant to section 73 of this Act.

Question No. 26:

Consortium Finance.

[Final/June, 2010](5 Marks)

Answer:

The term consortium is used for the companies which work together. Consortium finance also gives the same type of meaning which means when different banking companies agree to provide loan to any project jointly, such loan is known as consortium finance. The consortium finance is used for the big projects where huge investment is needed and single banker is unable to apply all the need of the project either because of lacking capital or because of limitation in the concentration to single person, firm or company made by NRB in its directives. The benefits of consortium finance can be analyzed from both the bankers and customers perspectives. From customers perspective it reduces the work of documentation and same collateral can work for all banking companies which are involved in consortium finance. And form banker's perspective it reduces the concentration risk and provides opportunity to work together with the competing companies.

The benefits from the consortium finance shall be shared on the basis of their investment or agreement made among them. NRB Directive No.11 makes detailed provision for the consortium finance. According to this directive no company other than licensed for banking transaction can participate in consortium except the Civil Servants Providend Fund (Karmachari Sanchaya Kosh), Citizens Investment Fund (Nagarik Lagani Kosh) and Insurance Companies. It is the right of customers and the applicant bank (in which customer apply for financing) to select the member of consortium. The leading bank for such consortium is determined on the basis of part of loan and the long term relation with the customer and the decision for the consortium finance should be

taken within 90 days from the formation of consortium group. It is the leading bank which is responsible for the payment of loan and its recovery. In case of partial recovery such amount will be distributed proportionally for all participating institutions.

Question No. 27:

Nampa Bank Limited filed an application for voluntary liquidation, which is approved by the Nepal Rastra Bank (NRB). Nampa Bank Limited, after getting approval from the NRB settled the liabilities in the following order on 2nd June 2004:

- Cost of liquidation
- Outstanding Staff wages
- Payables to staffs
- Deposits
- Sundry Creditors
- Loan from NRB
- Taxes, fees and other charges
- Other credits obtained by the shareholders
- Shareholders

Whether the order of priority in the settlement of liabilities while liquidating by Nampa Bank Ltd. is correct? If not, what would be the order of priority?

[June, 2004](5 Marks) [June, 2008](5 Marks) [December, 2009](5 Marks)

Answer:

According to the section 94(1) of Banks and Financial Institutions Act 2073, the order of priority in the settlement of liabilities while liquidating a licensed institution shall be as given below:

a) Expenses incurred for mandatory liquidation,
b) Amount upto the amount paid for deposit security/insurance made as per the prevailing laws subject not to exceed the limitation of total approved claimed amount of the depositor or the amount equivalent to the paid amount, if payment has been made to the security/insurance organization incorporated as per the prevailing laws for security of deposit,
c) The deposits remaining after payment made pursuant to Clause (b),
d) Salary, allowances and amounts for other liabilities payable to employees of the bank or financial institution,
e) Amount payable to Government of Nepal, local bodies, and the Rastra Bank,
f) Outstanding amounts payable to other bank or financial institutions as fees or valuation amount,
g) Amounts payable for other creditors and other claims;
h) Shareholders according to the prevailing laws.

Notwithstanding anything contained elsewhere in Chapter, in case any creditor submits an application agreeing to accept any of the assets that was not sold while auctioning pursuant to

Section 91 in lieu of the amount which the bank or financial institution has to pay him/her, the Liquidator may transfer such assets to such creditor having fixed the value of such assets subject to the norms determined by the Rastra Bank [u/s 94(2)].

Notwithstanding anything contained elsewhere in Chapter, in case any asset has been pledged as security for the secured creditors, such asset shall be used only for fulfilling the liability towards them[u/s 94(2)].

Therefore, the order of priority in the settlement of liabilities while liquidating by Nampa Bank Limited is not correct.

Question No. 28:

Nepal Bank Ltd., a licensed bank wants to amalgamate with the Rastriya Banijya Bank, another licensed bank. Advise them as to the formality to be complied with as per the Bank and Financial Institutions Act, 2063.

[December, 2009](5 Marks) [June, 2004](5 Marks)

Answer:

Section 69 of Bank and Financial Institution Act, 2073 prescribes about the merger of bank/financial institution as follows:

1) One bank or financial institution may be merged with another bank or financial institution or one bank or financial institution may acquire another bank or financial institution by fulfilling the procedures prescribed by this Act and the Nepal Rastra Bank Act.
2) A class "D" financial institution may be merged with or such institution may acquire another institution of the same class.
   Provided that, an infrastructure development bank and a bank or financial institution may not be merged into each other and none of them may acquire the other.
3) Notwithstanding anything contained elsewhere in this Chapter, in case any of the following circumstances is found from an Inspection and Supervision Report of the Rastra Bank, the Rastra Bank may order such bank or financial institution or any of its assets, liabilities, or business to merge or be merged into another bank or financial institution:-
   a) Capital fund is inadequate or financial position has been deteriorating for last three years,
   b) An act causing adverse effect on depositor's interests and liabilities towards depositors or such situation is prevailing,
   c) It is necessary to enhance the competitive capacity at national and international level for stability, development and promotion of the financial system of the state.
4) Notwithstanding anything contained elsewhere in this Chapter, in case any of the following circumstances is found from an Inspection and Supervision Report of the Rastra Bank, the Rastra Bank may order such bank or financial institution to acquire or cause to be acquired another bank or financial institution, having stated the reasons thereof:-
   a) In case more than one bank or financial institution belonging to single group of persons, firms and companies are in operation and there is unhealthy financial relation,

b) In case rights and interests of the depositors, ordinary shareholders, and other costumers could not be protected due to the negative impact, if the bank or financial institution is operated in the status quo,
c) System-based risks are increased and the licensed institution is unable to pay its liabilities,
d) In case shares have not been issued in the ordinary group within the prescribed time, the issued shares have not been sold or subscribed, or the prescribed minimum proportional paid up capital has not been met,
e) In case a bank or financial institution is subjected to actions of rapid reforms for three times or more or good governance has become weak due to arising of frequent disputes in the Board of Directors of the bank or financial institution.

5) While issuing order by the Rastra Bank pursuant to sub-Section (3) or (4) for merger or acquisition of bank or financial institutions, it may specify the procedures thereof in such order.

As per section 70 of the Act, application has to be submitted for merger or acquisition of bank/ financial institution as follows:

1) In case any bank or financial institution desires to be merged into another bank or financial institution, two or more bank or financial institution/s so desiring to merge or be merged shall have to decide the matter first from their respective Board of Directors and submit joint application to the Rastra Bank for theoretical approval stating the following matters:-
   a) Necessity of and justification for merger of the bank or financial institutions and general projection of the impact it is likely to cause in the banking and financial sector and fiscal system,
   b) Latest auditor's report of bank or financial institutions to merge or be merged including the audited balance-sheets, profit and loss account, cash flow statement and net worth and so on,
   c) Provisions made for protection of interests of the creditors of the bank or financial institutions to merge or be merged,
   d) Actual report of movable and immovable assets of the merging bank or financial institutions and period of payment of liabilities,
   e) Details of management of employees of the merged or merging bank or financial institutions,
   f) Approval process under the laws concerning company and securities;
   g) Preliminary agreement concluded for merger by the institutions;
   h) Other details as prescribed by the Rastra Bank.
2) In case any bank or financial institution desires to acquire another bank or financial institution, the concerned two or more banks or financial institutions shall have to decide the matter first from their respective Board of Directors and submit joint application to the Rastra Bank for theoretical approval stating the following matters:

a) Necessity of and justification of acquisition of the bank/s or financial institution/s and general projection of the impact it is likely to cause in the banking and financial sector and fiscal system,
b) Latest auditor's report of the principal institution and of the target institution/s including the audited balance-sheets, profit and loss account, cash flow statement and net worth and so on,
c) Provisions made for protection of interests of the creditors of the bank or financial institutions to be acquired,
d) Approval process under the laws concerning companies and securities,
e) Preliminary agreement concluded for acquisition of the bank or financial institution,
f) Other details as prescribed by the Rastra Bank.

3) The Rastra Bank shall inquire into the application submitted pursuant to Sub-Section (1) or (2) and in the course of the inquiry, the Rastra Bank may ask for discussions with the applicants as may be necessary and ask for additional documents.
4) If the Rastra Bank is satisfied upon inquiry carried out pursuant to Sub-Section (3) that the merger or acquisition would not have any negative impact on the development of banking and financial system of the country and in fair competition and compliance of the prevailing laws, it may give theoretical consent for moving ahead the process of merger or acquisition and while giving such approval, it may prescribe additional conditions or issue additional directives.

Question No. 29:
Write short note on Electronic Fund Transfer

[June 2009](5 Marks)

Answer:
Electronic fund transfer means the transaction made to collect deposit, make payments and transfer money through the means of telephone, telex, computer or magnetic tape or other similar electronic devices. It also means the transaction made through the means of automated tailor machine cash dispensing machine. In addition, it also includes transaction made through charge card, debit card or credit card or others.

As per section 2(vv) of BAFIA 2073, "Electronic transaction" means the business of accepting deposits, making payments and transferring funds through telephone, telex, computers or magnetic tapes or similar types of other electronic equipment; and this term also includes the transactions to be carried on through terminal, automated teller machines and cash dispensing machines, as well as those to be carried on through charge cards, debit or credit card.

Question No. 30:

Define "Exchange Equalization Reserve". Explain the provisions with regard to creation of this Reserve, under the Bank and Financial Institutions Act, 2063.

[December, 2008](5 Marks)

Answer:

Exchange equalization reserve is a reserve created by licensed institutions from revaluation gain in a financial year, due to movement in exchange rate of foreign currencies other than exchange rate of Indian rupee.

Section 45 of the Bank and Financial Institution Act, 2073 provides for creation of Exchange equalization reserve. As per Sub-Section (1), a bank or financial institution carrying on foreign exchange business shall make necessary accounts adjustments in the profit and loss account of the revaluation profits earned as a result of fluctuations in the exchange rates of foreign currencies, other than the Indian currency, every year at the end of the same fiscal year. While making such accounts adjustment in the profit and loss account, if revaluation earning has been made in any fiscal year, at least twenty five per cent of such profits shall be credited to the exchange equalization fund. Provided that in the case of revaluation profit-loss resulting from fluctuation in the exchange rate of the Indian currency, it shall be as prescribed by the Rastra Bank. As per sub-section (2), no amount credited to the exchange equalization fund pursuant to Sub-Section (1) shall, without the approval of the Rastra Bank, be spent or transferred for any purpose other than the adjustment of loss resulting from the devaluation of foreign currencies.

Question No. 31:

Can a licensed institution invest in Real Estate for trading purpose? Answer referring to the provisions of Bank and Financial Institutions Act, 2063.

[December, 2008](5 Marks)

Answer:

Section 49 of the Bank and Financial Institutions Act, 2073 has provided for various activities the different class of licensed institution can undertake. It has prescribed the activities of all four categories of licensed institutions.

Section 50 outlines the activities that a license institution is not supposed to undertake. As per Section 50(1)(a) of the Act, except for the purpose of its own use, license institutions are forbidden from buying property for trading purpose.

It is therefore, licensed institutions are not allowed to buy property for trading purpose.

Question No. 32:
The following figures are extracted from the books of a Bank:

Paid up capital	150 crore
General reserve	200 crore
Accumulated profit	80 crore

In the following financial year, the bank's net profit (after tax) worked out to Rs. 150 crore. The (after tax) profit includes convertible foreign currency revaluation gain of Rs. 10 crore.
The bank decides to capitalize Rs. 150 crore by way of bonus shares leaving a balance of Rs. 50 crore in accumulated profits.
Examine the Bank's decision in the light of the provision of the Banks & Financial Institutions Act, 2063.

[June, 2008](10 Marks)

Answer:
As per Section 44(1) of the Banks and Financial Institutions Act 2073, every licensed institution shall appropriate at least twenty percent of the net profits of each fiscal year until the paid up capital is doubled and at least ten percent shall have to be deposited in every fiscal year thereafter in such reserve fund.The amount credited to the reserve fund of a bank or financial institution under Sub-Section (1) may not be invested or transferred to any other headings without obtaining prior approval of the Rastra Bank [u/s 44(2)].
Further, as per section 45(1), a bank or financial institution carrying on foreign exchange business shall make necessary accounts adjustments in the profit and loss account of the revaluation profits earned as a result of fluctuations in the exchange rates of foreign currencies, other than the Indian currency, every year at the end of the same fiscal year. While making such accounts adjustment in the profit and loss account, if revaluation earning has been made in any fiscal year, at least twenty five per cent of such profits shall be credited to the exchange equalization fund.
Provided that in the case of revaluation profit-loss resulting from fluctuation in the exchange rate of the Indian currency, it shall be as prescribed by the Rastra Bank.
No amount credited to the exchange equalization fund pursuant to Sub-Section (1) shall, without the approval of the Rastra Bank, be spent or transferred for any purpose other than the adjustment of loss resulting from the devaluation of foreign currencies [u/s 45(2)].
In the given case, paid up capital is Rs. 150 crore, double of which is Rs. 300 crore. After transferring 20% of net profit (Rs. 30 crore), the general reserve will become Rs. 230 crore only, which leaves no scope for appropriating an amount lesser than 20% towards this fund.
Similarly, as per the provision of Sec. 45 of the Act, a bank is required to provide at least 25% of net revaluation gain towards Exchange Equalization Reserve. Hence, the bank has to provide Rs. 2.50 crore towards this Reserve.
Now, the given proposition is tested as under to examine the possibility of capitalizing Rs. 150 crore by way of bonus shares:

	(In crore)
Accumulated profit as given	Rs. 80
Net profit for the year	Rs. 150
Less – Transfer to General Reserve	Rs. (30)
Less - Transfer to Exchange Equalization Fund	Rs. (2.50)
Less – Balance to be left in P&L A/c	Rs. (50)
Net available balance	Rs 147.50

The bank will not be in a position to capitalize the full amount of Rs. 150 crore as desired, since after allocation of the required amount towards the respective funds and retaining the specified balance of Rs. 50 crore in the P & L account, there isn't enough fund for capitalization.

Question No. 33:

Write short notes on the following:

i) Risk Weighted Assets of a bank

ii) Utilization of Exchange Equalization Fund

[June, 2008](3+2=5 Marks)

Answer:

i. As per section 2(o) of Bank & Financial Institution Act 2073, risk weighted asset means the total assets calculated by multiplying the amounts coming under each heading of on-balance sheet and off-balance sheet operations of a bank or financial institution by the risk-weight on the format as prescribed by the Rastra Bank.

ii. Same type of question was asked in December, 2008 as well for 5 marks.

Question No. 34:

Classification of financial institutions.

[June, 2008](5 Marks)

Answer:

Section 37 of bank and Financial Institution Act, 2073 prescribes about the classification of financial institutions as follows:

The Rastra Bank shall, based on minimum paid up capital of the bank or financial institution submitting application pursuant to Section 33 for carrying on banking and financial transactions and transaction to be operated on by such bank or financial institution and working areas, classify banks or financial institutions in classes “A”, “B”, “C” and “D” and issue license to concerned banks or financial institutions accordingly.

Provided that an infrastructure development bank shall not be classified in any class.

Question No. 35:

Dhana Laxmi Bank Limited, a commercial bank established with a paid up capital of Rs.750 million, earned profits (after bonus and tax) of Rs.300 million in the FY 2063/64. The general reserve fund balance of the bank as of 1st Shrawan 2063 is Rs.1450 million. The profit of FY 2063/64 includes gain from foreign currency trading to the tune of Rs. 25 million and a foreign exchange revaluation gain of Rs. 10 million.

ii) Quantify the amounts that need to be appropriated to different funds.

iii) What are the pre-condition for declaration of dividends by Dhana Laxmi Bank?

[December, 2007](7 Marks)

Answer:

As per Section 44(1) of the Banks and Financial Institutions Act 2073, every licensed institution shall appropriate at least twenty percent of the net profits of each fiscal year until the paid up capital is doubled and at least ten percent shall have to be deposited in every fiscal year thereafter in such reserve fund.The amount credited to the reserve fund of a bank or financial institution under Sub-Section (1) may not be invested or transferred to any other headings without obtaining prior approval of the Rastra Bank [u/s 44(2)].

Further, as per section 45(1), a bank or financial institution carrying on foreign exchange business shall make necessary accounts adjustments in the profit and loss account of the revaluation profits earned as a result of fluctuations in the exchange rates of foreign currencies, other than the Indian currency, every year at the end of the same fiscal year. While making such accounts adjustment in the profit and loss account, if revaluation earning has been made in any fiscal year, at least twenty five per cent of such profits shall be credited to the exchange equalization fund.

Provided that in the case of revaluation profit-loss resulting from fluctuation in the exchange rate of the Indian currency, it shall be as prescribed by the Rastra Bank.

No amount credited to the exchange equalization fund pursuant to Sub-Section (1) shall, without the approval of the Rastra Bank, be spent or transferred for any purpose other than the adjustment of loss resulting from the devaluation of foreign currencies [u/s 45(2)].

Hence, in the given case, the net profit of Dhana Laxmi Bank Limited will be required to be appropriated in the following manner:

1) Out of Rs 300 million profit, at least Rs. 60 million i.e. 20%, is required to be appropriated to the general reserve fund,

   [If BAFIA, 2063 had not been repealed: Since the opening balance of the general reserve for the year is Rs 1,450 and if Rs 50 million is added to the fund it will become double the paid up capital of the bank i.e. Rs.1,500 million. So, the bank is required to transfer only Rs. 50 million to the general reserve fund].

2) The bank has gained Rs 10 million from foreign exchange revaluation. Hence, a minimum of 25% i.e. Rs. 2.5 million is required to be transferred to the exchange equalization fund of the bank.

Question No. 36:

The following data is taken from the Balance Sheet of Reliance Bank Ltd. as on Ashadh 31, 2061

	Rs.
5 Million Equity shares of Rs. 100 each	50,00,00,000
General Reserve	10,00,00,000
Total Debts	90,00,00,000

The Board of Directors of the Bank has resolved to buyback shares from the open market.

i. Calculate the maximum amount of share capital that the Bank can buy-back.
ii. What is the time limit for completion of the buy-back?
iii. Reliance Bank wishes to re-issue the bought shares to its employees who have served the Bank since its incorporation. Comment.

[June, 2007](5 Marks)

Answer:

i. The capital and reserve of the Bank is as follows:

Capital	50,00,00,000
General reserve	10,00,00,000
Total	**60,00,00,000**

Sub-section 2 (f) of section 13 of Banks and Financial Institutions Act, 2073 provides that the amount of capital bought back by the Bank or Financial Institutions shall not exceed 20% of the sum of its total Paid up Capital and General Reserve. Thus the Bank can buy-back shares at maximum Rs 12,00,00,000 of its capital.

Sub-section 2 (e) states that the total debts of the Bank/ FI shall not be more than twice the sum of its capital and General Reserves after the buy-back. Since the total debts stand at Rs. 90,00,00,000, the sum of capital and general reserve after buy-back cannot be less than Rs. 45,00,00,000 i.e. capital up to Rs. 15,00,00,000 could be bought back.

However, because of the restrictive provision of sub-section 2 (f), the Bank can only buy back 12,00,000 equity shares.

ii. The Bank should complete buy-back of shares within six months of the date of approval from Nepal Rastra Bank or within twelve months from the date of passing special resolution by the General Meeting whichever is later (sub-section 4).

iii. As per sub-section 8 of section 13 of the Act, the shares bought back by the Bank/ FI shall be cancelled within 120 days from the date of buy-back. Thus Reliance Bank cannot re-issue such shares to its employee but has to cancel them within 120 days.

Question No. 37:
Discuss the provision for treatment of its Dormant Accounts and unclaimed dividend by a licensed institution?

[June, 2007](5 marks)

Answer:
Section 112 of Bank and Financial Institution Act, 2073 prescribes about the dormant account as follows:

1) A bank or financial institution shall, within the first month of each fiscal year, submit to the Rastra Bank statement of deposit accounts which have remained unreported, and of those the title to which have not been claimed under this Act for ten years.
2) A bank or financial institution shall publish a notice to collect the unused or unclaimed deposits as referred to in Sub-Section (1) once in every five years in a national level daily newspaper. Details description of that shall also have to be kept by the bank or financial institution in its website.
3) In case the amount as referred to in Sub-Section (1) is not collected for a period of twenty years, such deposit shall be collected to the Banking Development Fund of the Rastra Bank and be used for banking development.

Clause 3 of Unified Directive No. 16 issued by Nepal Rastra Bank prescribes about the unclaimed dividend as follow:
If any shareholder or his beneficiary does not come to collect the dividend even for 5 years from the date of dividend declaration by the licensed institution, it shall publish the details of such shareholders at national level newspaper at least once within one month after the expiry of each fiscal year. If no any claim is received even after the publication of such notice, "Unclaimed Dividend A/C" shall be created in the concerned institution and such amount shall be transferred in that account. Particulars at lump sum may be published while publishing the records regarding the transferred bonus amount. In addition, a copy of such published particulars shall be submitted to Nepal Rastra Bank.

Question No. 38:
Under what circumstances can Nepal Rastra Bank suspend the banking license given to a Finance Company? Can the aggrieved Finance Company appeal against this order of the NRB?

[December, 2003](5 Marks) [December, 2006](10 Marks)

Answer:
As per section 99(2) of Bank & Financial Institution Act 2073, the Rastra Bank may suspend or revoke the license to carry out banking or financial transactions issued to a bank or financial institution in following circumstances:-

a) In case banking and financial transactions are not initiated within six months from the date of obtaining the license for carrying on banking and financial transactions,

b) In case banking and financial transactions have been closed without obtaining approval from the Rastra Bank,
c) In case of operation of banking and financial transactions against interests of depositors or demanded or matured deposits are not repaid or could not be repaid while on-demand,
d) In case of violation or non-compliance of the Rastra Bank Act, this Act, and the Rules, Byelaws, Orders, Directives framed thereunder or the terms and conditions as prescribed by the Rastra Bank,
e) In case the bank or financial institution is found to have taken license having submitted false description,
f) In case the deposits have not been guaranteed as per the prevailing laws.

As per section 105(1) of Bank & Financial Institution Act 2073, the bank or financial institution or a Director, official or employee thereof which/who does not satisfy with the actions taken by the Rastra Bank pursuant to Section 99 or punishment imposed pursuant to Section 100, may file an appeal at the court within 35 days from the date of getting order of such actions.
Provided that while filing an appeal against an action taken pursuant to Section 99 or punishment imposed pursuant to Section 100 on a bank or financial institution by any shareholder, it has to be filed by the representative of the shareholders representing at least 25 percent of the paid up capital of the bank or financial institution.
As per section 105(2) of the Act, in case any Director, official, employee or any other person desires to file an appeal pursuant to Sub-Section (1) against the personal actions or fines, fifty percent of the amount of such fines or any amount as given order to pay must be deposited.
As per section 105(3) of the Act, the Director, official or employee of any bank or financial institution who is removed or dismissed from the office shall not be eligible to become a Director, official or employee of any other bank or financial institution until a period of five years is expired from the date of such taking of actions or until the final decision of the case, if he/she has filed an appeal.

Question No. 39:
Pari Passu

[December, 2006](5 Marks)

Answer:
In case anyone has obtained credit from several creditors in one or several installments by pledging his property as collateral and the property so pledged as collateral is not sufficient to repay the credit of all the creditors, all the creditors who have used the property as collateral shall be deemed to have equal status (pari passu) in respect to outstanding credit and all of them may make a proportionate claim on that property except when otherwise provided for in the contract.

Question No. 40:
Rule of Ejusdem Generis

[December, 2006](5 Marks)

Answer:
The rule of Ejusdem Generis (of the same kind or species) mean that where specific words are used and after those specific words some general words are used, the general words would take the colour from the specific words used earlier.

Question No. 41:
Whether Banks and Financial Institutions can purchase its own shares? If yes, what are the various conditions to be fulfilled to buy back its shares ? Explain in brief, with reference to the provisions of the Bank and Financial Institutions Ordinance 2004.

[June, 2006](5 Marks) [December, 2005](5 Marks)

Answer:
Section 13 of Bank and Financial Institution Act, 2073 prescribes about the buyback of shares as follows:

1) No bank or financial institution shall purchase its own shares or lend loan against security of its own shares.
2) Notwithstanding anything contained in Sub-Section (1), in the following circumstances, a bank or financial institution may, with the approval of the Rastra Bank, purchase its shares out of its free reserves available for being distributed as dividends not exceeding the percentage prescribed by the Rastra Bank: -
   a) If the shares issued by the bank or financial institution are fully paid up,
   b) If the shares issued by the bank or financial institution have already been listed in the securities market,
   c) If the buy-back of own shares is authorized by the Articles of Association of the concerned bank or financial institution,
   d) If a special resolution has been adopted at the General Meeting of the concerned bank or financial institution authorizing the buy-back of own share,
   e) If the ratio of the debt owed by the bank or financial institution is not more than double of the capital and general reserve fund after such buy-back of shares,
      Explanation: For the purposes of this sub-Section, "debt" means all amounts of secured or unsecured debts borrowed by the bank or financial institution.
   f) If the value of shares to be bought back by a bank or financial institution is not more than twenty percent of the total paid up capital and general reserve fund of that bank or financial institution,

g) If the buy-back of shares comply with the directives relating to capital fund issued by the Rastra Bank to the bank or financial institution,
h) If it is not against the directives issued by the Rastra Bank from time to time with regard to buy back of shares.

3) Any bank or financial institution shall have to make an application before the Rastra Bank for getting approval to buy-back own share pursuant to Sub-Section (1) with the following details:-
   a) The reason, necessity, time duration and modus-operandi for the buy-back of shares,
   b) A statement of the evaluation of possible impacts on the financial situation of the bank or financial institution as a result of the buy-back of shares,
   c) The type of share, par value of share and number of shares purpose to buy-back,
   d) The maximum or minimum amount required to buy-back shares as referred to in Part (c), and source of such amount,
   e) Such other matters as specified by the Rastra Bank with regard to the buy-back of shares,
   f) Other necessary matters to be mentioned as per the prevailing laws.
4) The Rastra Bank may, in case it deems appropriate to grant approval to such bank or financial institution to buy back its own shares based on the application acquired pursuant to Sub-Section (3) and details enclosed with it, grant such approval.
5) Upon receipt of the approval pursuant to Sub-Section (4), the concerned bank or financial institution may buy back its shares in any of the following manners, within six months from the date of receipt of such approval or within twelve months of the adoption of a special resolution at the General Meeting, whichever occurs later: -
   a) Purchasing through the securities market,
   b) Purchasing from the existing shareholders on a proportional basis.
6) If a bank or financial institution buys back its own shares pursuant to Sub-Section (5), it shall file with the Rastra Bank a return containing the number of shares bought back, amount paid for the same and other necessary details within thirty days of the date of such buy-back.
7) There shall be established a separate capital redemption reserve fund, to which a sum equal to the face value of the shares bought back pursuant to Sub-Section (5) shall be transferred; and the amount of such fund shall be maintained as if it is the paid-up capital.
8) If the bank or financial institution buys back its shares pursuant to Sub-Section (5), it shall cancel the shares so bought back within one hundred twenty days of the date of such buy-back.
9) Other provision regarding to buy-back own shares by the bank or financial institution shall be as prescribed by the Rastra Bank.

Question No. 42:

Rabo Bank Limited, a category of "B Licenses Institution" seeks your acdive regarding the appointment of Mr. Pankaj, a Chartered Accountant, of its professional director:

i. Whether Board of Rabo Bank can appoint Mr. Pankaj as a professional director?
ii. How many qualification shares to be held by Mr. Pankaj to become a professional director?
iii. Whether Pankaj, can be elected as the Chairman of the Board of Rabo Bank? Whether Mr. Pankaj can exercise his voting rights in Board?

Advice the Bank, with reference to the provisions of the Bank and Financial Institutions Ordinance 2004.

[June, 2006](5 Marks)

Answer:

i. Section 17 of Bank and Financial Institution Act, 2073 prescribes about the qualification of independent directors as follows:

While appointing Independent Director of the bank or financial institution, appointment shall be made from amongst the persons having met the following qualification and experience:-

a) In case of class "A" bank or national level class "B" development bank, having obtained at least master's degree in the subject as prescribed by the Rastra Bank and experiences as prescribed by the Rastra Bank,
b) In case of class "B" development bank and financial institution of class "C", except the class "B" development bank of national level, having obtained at least bachelor's degree in the subject prescribed by the Rastra Bank and work experiences as prescribed by the Rastra Bank,
c) In case of micro finance institution of class "D", the person possessing the qualifications and experiences prescribed by the Rastra Bank.

Hence, Board of Rabo Bank Ltd can appoint Mr. Pankaj as a professional director, if he holds master degree or master degree equivalency academic certificate and experience prescribed by Nepal Rastra Bank. After his appointment, information thereof shall be furnished to the first general meeting to be be held after such appointment pursuant to section 14(3) of the Act.

ii. As per section 18 of Banks and Financial Institutions Act 2073, there is no minimum share qualification for a professional director. Instead, there is a maximum limit i.e. promoter or shareholder holding ownership of more than 0.1 % share of concerned bank or financial institution cannot become an independent director of the concerned licensed institution.
Therefore, Mr. Pankaj, need not hold any qualification shares in Rabo Bank.

iii. According to section 14(5) of the Act, the directors should elect a chairperson from among themselves by majority. Thus, Mr. Pankaj can also be elected as the chairperson of the Board and can exercise his voting right in the Board of Rabo Bank

Question No. 43:
Distinguish between Bank vs. Financial Institutions.

[June, 2006](5 Marks)

Answer:
As per section 2(e) of BAFIA 2073, "Bank or financial institution" means a bank or financial institution which has obtained a license pursuant to this Act for carrying on banking or financial transaction.

Bank:
As per section 2(gg) of the Act, "Bank" means a corporate body incorporated to carry on banking and financial transactions pursuant to Sub-Section (1) of Section 49 and the term also includes a branch office of a foreign bank located in Nepal, a branch office opened outside of Nepal by a bank incorporated in Nepal and an Infrastructure Development Bank to carry on functions pursuant to sub-Section (5) of Section 49 and branch office of the same bank.
As per section 2(z), "Infrastructure Development Bank" means an Infrastructure Development Bank incorporated to carry on financial transactions as mentioned in sub-section (5) of section 49.

Financial Institution:
As per section 2(ss) of the Act, "Financial institution" means a corporate body incorporated to carry on banking and financial transactions pursuant to sub-sections (2), (3) or (4) of Section 49 and the terms also includes a branch office of a development bank, finance company, micro finance institution or a branch office of a foreign finance company located in Nepal or a branch office opened in abroad by a financial institution incorporated in Nepal.

Question No. 44:
Surya Bank Ltd., a category of A licensed institution seeks your advice on the appointment of its professional director:

[June, 2005](5 Marks)

i. Can the BOD appoint such a director?

Answer:
Sub-section 3 of section 14 of Banks and Financial Institutions Act, 2073 states that the Board of Directors can appoint professional director on its Board and information thereof shall be furnished to the First General Meeting to be held after such appointment.

ii. Will the director have voting rights? Can he be elected as the Chairman of the Board?

Answer:
The Act doesn't deny voting right to the professional director. According to sub-section 5 of section 15 of Bank & Financial Institution Act, 2073, the directors should elect a Chairman from among themselves by majority. Thus the incumbent can be elected as the Chairman of the Board.

iii. Explain the provisions regarding qualification shares and alternate director to the incumbent.

Answer:

Proviso clause to sub-section (3) of section 14 prescribes that the promoter, Director or shareholder possessing more than 0.1 percent share of the bank and financial institution and his/her member of family shall not be allowed to become a Professional Director.

Section 17 (6) of the Act entitles only the company, corporate body, foreign bank or financial institution which has subscribed shares of a bank or financial institution may, while appointing a director proportionate to the shares as it has subscribed, appoint an Alternate Director to work in absence of the Director.

Question No. 45:

What are the major responsibilities of a director in a financial institution as outlined by the "Bank & Financial Institution Ordinance 2060" B.S.

[June 2005](5 Marks)

Answer:

Section 23 of BAFIA, 2073 prescribes about the responsibility of directors as follows:

1) A Director shall not commit or cause to be committed any act for personal benefit through a bank or financial institution or in the course of business of bank or financial institution.
2) A Director shall be personally liable to any act carried out exceeding his/her authority as in the capacity of a Director of the bank or financial institution.
3) A Director of a bank or financial institution shall have to assume responsibility with regard to risks management and internal control by following sound business strategies of the institution.
4) A Director shall not have to intervene in the daily functions and activities of the management of the bank or financial institution.
5) A Director shall have to fully comply with the directives issued by the Rastra Bank from time to time.

Question No. 46:

What do you understand by the term "Capital Adequacy"? What is the Capital Adequacy Ratio prescribed by NRB for Commercial Banks for the FY 2060/2061?

[June, 2004](5 Marks)

Answer:

Capital Adequacy ratio is the ratio of the total capital of the bank to its total risk weighted assets. The total capital comprise of core capital (paid up capital, share premium, non-redeemable preference shares, retained earnings, General Reserves and such other free reserves) and supplementary capital (Asset revaluation reserve, hybrid capital instruments, sub-ordinate term

debt, revaluation reserve and other specific reserves). Risk weighted assets is calculated by assigning weights specified by the Nepal Rastra Bank to all On-Balance Sheet and off-balance sheet exposure of the bank/financial institutions.

The Capital adequacy ratio for Commercial banks shall be as prescribed in clause (1) of Unified Directive No. 1 issued by Repal Rastra bank as follows:

BASEL III in Nepal

Transition Period	**(Mid July)**				
	2015	2016	2017	2018	2019
Minimum Common Equity Capital Ratio	4.00%	4.50%	4.50%	4.50%	4.50%
Capital Conservation Buffer	1.00%	1.25%	1.50%	2.00%	2.50%
Minimum common equity plus capital conservation buffer	5.00%	5.75%	6.00%	6.50%	7.00%
Minimum Tier 1 Capital (Excluding conservation buffer)	6.00%	6.00%	6.00%	6.00%	6.00%
Minimum Total Capital Excluding conservation buffer)	10.00%	9.75%	9.50%	9.00%	8.50%
Minimum Total Capital (Including conservation buffer)	11.00%	11.00%	11.00%	11.00%	11.00%
Counter Cyclical Buffers	Introduce minimum standard	0-2.5%	0-2.5%	0-2.5%	0-2.5%
Leverage Ratio	Introduce minimum standard	Offsite Monitoring 4.00%			Migration To Pillar 1
Liquidity coverage ratio	Review Existing Framework		LCR 100%	LCR 100%	LCR 100%
Net stable funding ratio	Observation and Parallel Run		Introduce minimum	Implemented	

		standard	
SIFI Measures	NRB shall issue the regulation.		

Question No. 47:

A group of businessmen desirous of establishing a Development Bank in Kathmandu valley seek your advice on the following issues

i. Capital requirement.
ii. Documents to be submitted to NRB for seeking its approval. Advise

[December, 2003](5 Marks)

Answer:

i. Capital requirement:

As per section 41 of BAFIA 2073, the minimum paid up capital of the bank or financial institutions shall be as prescribed by the Rastra Bank from time to time. Banks or financial institution shall have to fulfill the minimum paid up capital pursuant to Sub-Section (1) within the time frame as set by the Rastra Bank.

Using the authority provided by the Act, NRB has prescribed the minimum paid up capital for a development bank in its Unified Directive No. 22 as follows:

Class	National Level	Up to 10 districts within 3 provinces	Up to 5 districts within 3 provinces
Development Bank "B Class"	Rs 250 Crore	Rs 120 Crore	Rs 50 Crore

ii. Documents to be submitted to NRB for seeking its approval. Advise.

Same type of question was asked in December, 2012 for 5 marks.

Question No. 48:

Shri Dhani Chand defaulted payment of principal and interest of a loan taken from Saraswati Bank. After realization from the securities pledged with the bank, the balance receivable was realized from the savings account of Shri Dhani Chand maintained with the bank.

Can the bank realize its dues from the client's bank account, not offered as security, without his consent?

[December, 2003](5 Marks)

Answer:

Section 57 of BAFIA, 2073 prescribes about the recovery of credit as follows:

1) Notwithstanding anything contained in the deed of loan or in the prevailing Nepal law, the bank or financial institution may recover its principal and interests having sold by auction the assets taken or put as mortgaged by the borrower in the name of the bank or financial institution, if the borrower fails to abide by the terms of the credit as mentioned in the deed or agreement or any terms and covenants made with a bank or financial institution or fails to repay credit to the bank or financial institution within the time-limit stipulated in the deed, or if the bank or financial institution is found, through the monitoring conducted pursuant to Section 56, that it has misused the credit by using it for the purpose other than the purpose for which it was disbursed.
2) Notwithstanding anything contained in the prevailing law, in case the borrower gives off the title in any manner whatsoever over the assets mortgaged collateral security or the value of assets mortgaged as collateral security to the bank or financial institution is decreased, the bank or financial institution may ask such borrower to place more assets as collateral security within the time limit specified by it and the borrower shall have to place additional collateral security within the time-limit prescribed by the bank or financial institution.
3) In case the borrower fails to place more assets as collateral within the time limit pursuant to Sub-Section (2) or the principal and interests could not be recovered from the collateral security so mortgaged, the bank or financial institution may recover its principal and interests from the movable or immovable assets under the ownership or title of the borrower according to the prevailing laws.
4) In case any amount remains after deducting the amount realized from auction sale or other provisions under this Section from the amount of expenses and the amount of principal and interests of the bank or financial institution, such remaining amount shall have to be refunded to the concerned borrower.
5) The bank or financial institution shall write to the concerned office to register or transfer the ownership of the assets so auctioned as per this Section in the name of the person accepting the auction in accordance with the prevailing law.
6) In case the bank or financial institution writes for registering or transferring the ownership of the assets pursuant to Sub-Section (5), notwithstanding anything contained in the prevailing laws, the concerned office shall have to register or transfer the ownership of the assets as requested.
7) In case no one accepts the movable or immovable assets while carrying out auction by the bank or financial institution under this Section, the bank or financial institution shall take into its ownership such assets as prescribed.
8) The bank or financial institution shall write to the concerned office to register or transfer the ownership of the assets it has taken into its ownership pursuant to Sub-Section (7). In case such request is received, the concerned office shall, notwithstanding anything contained in the prevailing laws, register or transfer the ownership of the assets in the name of the concerned bank or financial institution.

9) In case the then owner denies to, or obstructs in, possessing the property accepted by any person or a bank or financial institution and the party accepting the auction who has the right to enjoy the assets according to laws, the concerned body of Government of Nepal shall take action to cause to possess of said property as per the prevailing law.
10) The licensed institution shall not be entitled to suspend the recovery process of the credit written off subject to the prevailing Credit Write-off Byelaws.
11) In case a borrower does not repay the credit from a bank or financial institution and the interests accrued thereto and penal interests within the time limit stipulated in the deed of the credit or the contract, the bank or financial institution shall have to write to the Credit Information Bureau Limited to blacklist such borrower according to the prevailing laws.
12) In case the credit could not be recovered even after taking actions against the borrower under this Section, the bank or financial institution may, for the purpose of recovering such credit amount, take actions for recovery of the credits according to the prevailing laws including freezing of any assets of the borrower located in a foreign country.
13) In case the credit could not be recovered even after taking all actions under this Section, the concerned bank or financial institution may request the Rastra Bank for making necessary provisions to withhold or confiscate the passport/s of the concerned borrowers and to deprive the concerned borrower from availing the services to be made available by the state. Upon receipt of such request, Rastra Bank shall have to forward the request to Government of Nepal for necessary actions along with its opinion.
14) The taking actions by any bank or financial institution against anyone in the course of recovery of credits shall not be deemed to have prevented to take legal actions for any offence as per the prevailing laws.

Hence, Sarswati Bank, in the given case, is entitled to realize its dues from the saving account of Shri Dhani Chand.

Question No. 49:

Agriculture Development Bank is prohibited to grant credit without obtaining collateral securities. Examine exceptions quoting relevant provisions of the Act.

[December, 2003](5 Marks)

Answer:

Section 55 of BAFIA 2073 prescribes about the disbursement of credit as follows:

1) A bank or financial institution shall have to disburse credit only after disclosing the purpose subject to the directives issued by the Rastra Bank from time to time and the credit policy as determined by the Board of Directors.
2) While disbursing credit, a bank or financial institution shall have to obtain any movable or immovable property acceptable to it as a collateral security or an appropriate guarantee so as to safeguard interests of its own and of the depositors.

3) A bank or financial institution shall have to write to the concerned office to withhold any property which it has taken up as collateral security against a credit pursuant to this Section in the name of the bank or financial institution so that such property may not be registered in name of, or transferred to, any person in any manner whatsoever.
4) When requested in writing to withhold, registration or transmission of property pursuant to Sub-Section (3), the concerned office shall have to withhold the registration or transmission thereof accordingly.
5) In case the Rastra Bank gives direction to disburse credits for such class and in such area as prioritized for the economic upliftment of the persons belonging to a low-income group and indigent class and of the inhabitants residing in any specific geographical region, to banks or financial institutions shall have to disburse credits according to the direction.
6) The terms and conditions, repayment schedule, and interests of the credits borrowed by the borrower shall be according to the deeds or agreement executed between the bank or financial institution and the borrower.
7) The bank or financial institution shall have to collect necessary details of identity documents of the borrower, guarantor or, if the borrower is a firm, company or an institution, the directors, the shareholders having subscribed the shares in numbers more than the percent prescribed by the Rasta Bank or partners or owners in any manner thereof; the members of families of all of the above persons and if any of them is a beneficiary of any institution, and evidence of identity that may be required while taking legal actions.
8) While disbursing any credit by a bank or financial institution to anyone, the regular installment of the credit, interests, penal interests and repayment schedule shall have to be clearly specified in deed or contract and information thereof must be given to the borrower and guarantor.
Hence, in the given case, the bank can also disburse loan against guarantee, if there is no any property as collateral.

Question No. 50:

What do you understand by the term "Liquidity" under the Commercial Bank Act, 2031? What is the liquidity ratio (CRR) prescribed by NRB to the Commercial banks that is currently in force?

[December 2003](5 Marks)

Answer:

As per section 2(p) of BAFIA 2073, "Liquid assets" means the cash balance of a bank or financial institution, the balance remained in the current account, the balance maintained in Rastra Bank and such assets of a bank or financial institution specified as liquid assets by the Rastra Bank from time to time.

The CRR prescribed by NRB to the Commercial Banks through its Unified Directive No. 13 for F/Y 2074.75 is 4% of all local currency deposits (savings, current & fixed) which should be maintained as balances with the Nepal Rastra Bank all the time.

CHAPTER-5

NEPAL RASTRA BANK ACT, 2058

[Note: All answers suggested hereby have been updated as per NRB Act, 2058 with Second Amendment, 2073]

Question No. 1:

Certain customers of a commercial Bank have made an application that the commercial bank is in a problematic condition. State the circumstances in which banks or financial institutions will be deemed problematic as per the Nepal Rastra Bank Act 2058. **(December 2022) (5 Marks)**

Answer:

Under Section 86B of Nepal Rastra Bank Act, 2058, Nepal Rastra Bank will declare any commercial bank or financial institution problematic by providing written notice to it when Nepal Rastra Bank is convinced that the following conditions are prevailing in any commercial bank or financial institution:

a. In case any action against the interest of the depositors, shareholders, creditors or general public is evident,
b. In case of not fulfillment of any financial liabilities or not having probalility to do that or not payment of due amount,
c. In case of insolvency or going t be insolvent or facing material financial difficulties,
d. In case of non-compliance with or breach or the Nepal Rastra Bank Act, prevailing law related to bank and financial institution, other prevailing law, terms of licenses or regulation, directives or order of bank,
e. In case it is evident that the license has been obtained on the basis of submitting false, fraudulent, wrong document or data,
f. In case of inability to maintain the capital fund as per Nepal Rastra Bank Act, prevailing law related to bank and financial institution and directives issued by the bank at time to time.
g. In case of the initiation of legal proceedings for liquidation or resolution r insolvency of any commercial bank or financial institution under the prevailing law,
h. In case of undue delay in the process of voluntary liquidation where such proceeding has been initiated,
i. For the commercial bank or financial institution established with the joint venture of the foreign commercial bank or financial institution, while such foreign commercial bank or financial institution is insolvent or liquidator is appointed for the liquidation or the license of such commercial bank or financial institution is terminated under the provision of the law or respective country or transaction is banned either fully or partially or where it is evident that operation of banking transaction is done in association with such commercial bank or financial institution, or
j. If the Nepal Rastra Bank is convinced that commercial bank or financial institution is unable t pay its due or can make negative effect in its liability or duties, which it has to perform.

Question No. 2:

How does Nepal Rastra Bank mobilize Foreign Exchange Reserve? Explain it in the light of Nepal Rastra Bank Act, 2058.

(June 2022, 7 Marks) [December, 2020/2011](5 Marks)

Answer:

In pursuance to section 66 of NRB Act, 2058, NRB shall mobilize Foreign Exchange Reserve in the following manner:

1) NRB 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 NRB;
   (b) Foreign currencies held by or for the account of NRB;
   (c) Foreign currencies held in the accounts of NRB on the books of a foreign central bank or other foreign banks;
   (d) Special drawing rights (SDR) held by NRB 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 NRB;
   (f) Any forward purchase or repurchase agreements of NRB concluded with or guaranteed by foreign central banks or public international financial institutions, and any futures and option contracts of NRB 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 NRB's capital and liquidity to maximize earnings.
3) NRB shall maintain international reserve at a level, which shall be adequate for the execution of monitory 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, NRB 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, NRB shall make further such report and recommendations to Government of Nepal
6) NRB shall hold the foreign exchange reserve referred to in sub-section (1) in its balance sheet.

Question No. 3:

Nepal Rastra Bank Act, 2058 has been enacted to provide for the establishment of Nepal Rastra Bank to carry out the functions of the central bank. State how the Nepal Rastra Bank as a central bank perform its work regarding the regulation, inspection and supervision of the banks. **(December 2021) (5 Marks)**

Answer:

a) Chapter - 9 of the Act prescribes the provision regarding the Regulation, Inspection and Supervision of the Banks as follows:

Pursuant to Section 76 Bank's Approval Required for Accepting Deposits or Giving Credits:

(1) Any person, firm, company or institution shall, in order to accept any type of deposit or to provide loan, obtain approval from the Bank as may be prescribed.

(2) The Bank, while giving approval referred to in sub-section (1), may subject the approval to the terms and conditions prescribed by the Bank and it shall be the duty of the concerned person, firm, company or institution to abide by such terms and conditions.

Section 77 empowers the NRB on Restriction on Rate of Interest**:** An individual, firm, company or organization authorized to accept deposit or to provide loan pursuant to prevailing laws, shall fix the rate of interest payable on deposit and to be charged on loan subject to arrangement prescribed by the Bank in the matter of rate of interest from time to time.

Under Section 78 NRB being central bank every commercial banks and financial in order to conduct banking and financial transaction, shall obtain license from the Nepal Rastra Bank as prescribed. While issuing license pursuant to sub-section (1), the Bank may fix necessary terms and conditions and it shall be the duty of the licensed bank and financial institution to abide by such terms and conditions.

Section 79 prescribes the Regulatory Powers of the Nepal Rastra Bank:

(1) The Bank shall have full powers to regulate the functions and activities of commercial banks and financial institutions.

(2) For the purpose of the regulation under sub-section (1), the Bank may frame rules and bye-laws on the matters which the Bank deems appropriate and issue necessary order, directives and circular and it shall be the duty of the concerned commercial bank and financial institution to abide by such rules, bye-laws, order, directives and circulars.

(3) The Bank shall issue appropriate directives to commercial banks and require them to submit the following particulars:-

(a) Its balance sheet accounts, off balance sheet commitments, statement of income and expenditures and their ratio among accounts or items.

(b) Prohibitions, restrictions or conditions concerning specific types or forms of credit or investments, or of credit or investments, forms of commitments of a risk-bearing nature which are not matching as to maturity of assets and liabilities and off-balance-sheet items, foreign currency, spot or advance rate of interest, swap, option or similar instruments or access to the payments system through electronic or other means.

(c) Other particulars and documents prescribed by the Bank.

(4) Bank may issue necessary directives to commercial banks on the following subjects and require to submit particulars on the following subjects:-

(a) Books and accounts, profit and loss account, balance sheet and off-balance sheet transaction and commitment, statement of income and expenses and their ratio among accounts or items.

(b) Prohibitions, restrictions or conditions concerning specific types or forms of credit or investments, loan and investment in excess of the ceiling prescribed by the Bank, risk bearing commitment, position of foreign exchange, payment and electronic and other means of payment.

(c) Other particulars and documents prescribed by the Bank.

(5) The Bank shall have the following powers with regard to commercial banks and financial institutions:-

(a) To enforce authority and responsibility granted under this Act and any other Act enacted for licensing, supervising and regulating commercial banks and financial institutions and to revoke the license of commercial banks and financial institutions and to take over or to provide in trusteeship the commercial banks or financial institutions which have been declared insolvent or are on the verge of insolvency;

(b) To investigate or inspect, or supervise or to cause to investigate, inspect or supervise by any official of the Bank or the person designated by the Bank the books and accounts, records, documents or register of commercial banks or financial institutions in order to find whether or not any commercial bank or financial institution has conducted business and transaction in accordance with the provision made under this Act or the Rules, bye-laws framed thereunder and an order or directive issued thereunder;

(c) To issue order to the member of the Board of Directors, official or employee of any commercial bank or financial institution to provide necessary information about the bank or institution in cases where it is necessary to inspect and supervise the transaction of such bank or financial institution.

Pursuant to Section 80 Banking and Financial System and Credit Control is there on the part of the NRB. The Bank may issue directives from time to time to commercial banks and

financial institutions on banking financial system, currency and credit. It shall be the duty of commercial banks and financial institutions to abide by such directives.

Credit to Prescribed Sectors:

(1) Commercial banks and financial institutions shall advance credit to the sectors prescribed by the Bank from time to time for a prescribed period and in the manner prescribed by the Bank.

(2) In cases where any commercial bank or financial institution does not advance the credit pursuant to sub-section (1) or advance credit less than prescribed amount, the Bank may recover as fine an amount equal to the interest which a commercial bank or financial institution would have charged for the amount of credit not advanced or advanced less than the prescribed amount from the concerned commercial bank or financial institution.

Under Section 82 Information to be Furnished to Bank**:**

(1) Commercial Bank and financial institution shall furnish the particulars of its transaction and financial position to the Bank as prescribed by the Bank.

(2) The Bank may publish the particulars made available pursuant to sub-section (1).

Pursuant to Section 83 it is require to obtain approval to issue debentures and financial instruments:

(1) Commercial banks and financial institutions shall, while issuing any type of debenture or financial instruments, obtain a prior approval of the Bank.

(2) While giving approval referred to in sub-section (1), the Bank may prescribe necessary terms and conditions and it shall be the duty of the concerned commercial bank and financial institution to abide by such terms and conditions.

Question No. 4:

Nepal Rastra Bank declared a commercial bank 'B' as problematic and took it under its control and reduced its share capital pursuant to the Nepal Rastra Bank Act, 2058. Some of the shareholders of the bank challenged the decision of NRB before the Board of Directors of the Nepal Rastra Bank. Answer the following questions pursuant to Nepal Rastra Bank Act, 2058.

i) Whether the shareholders of the bank are eligible to make an appeal to the Nepal Rastra Bank?
ii) What authority the BOD of Nepal Rastra Bank shall exercise while hearing the appeal?

(June, 2021) (6 marks)

Answer:

i) Section 86 Jha(1) of Nepal Rastra Bank Act (NRB), 2058 provides right to appeal against the order of the NRB to its Board of Directors, as under:

Only the representative of shareholders of the Commercial Bank 'B' can appeal to the Board of Directors of NRB within fifteen days against the action and decision of NRB to reduce the share

capital of this Bank 'B' after declaring this Bank problematic after taking it under its control under Section 86 Ja of this Act, if not satisfied with such action and decision.

Explanation of section 86 Jha(1) of this Act provides that for the purpose of this Section "shareholders' representative" means representative elected among the shareholders having minimum twenty five percent of prevailing share.

So no appeal will be entertained without having the representation of twenty five percent of prevailing shares within the time pursuant to section 86 Jha(2) of this Act. Therefore the 'Few Shareholders' of Commercial Bank 'B' hold insignificant number, so they are not entitled to appeal to the BOD of NRB.

ii) In case of the appeal under the provision of Sub-section (1) above, the BOD of NRB has to approve, review or cancel the action, and decision done by NRB, within thirty days of receipt of such appeal by giving related proof, basis and reasons pursuant to section 86 Jha(3) of this Act.

Bank may provide information about the decision made under Sub-section (3) within fifteen days of such decision to the respective representative of the shareholders of Bank 'B' pursuant to section 86 Jha(4) of this Act.

The action and decision of NRB shall remain continue unless the BOD of NRB under Sub-section (3) above cancel it pursuant to section 86 Jha(5) of this Act.

The decision of the BOD of NRB under Sub-section (3) above on the appeal of the shareholders' representative shall be final pursuant to section 86 Jha(6) of this Act.

Question No. 5:

The clarification given by Mr. Pradhumnalal, the Governor of Nepal Rastra Bank is ascertained as not valid as to the lack of knowledge of management. So, he was removed from the post. While at the time of appointment, his name was recommended to the Government of Nepal, Council of Ministers as a renowned export in the field of economics. There is no any appointment till now. Answer the followings:

i) Who shall discharge the job of Governor before the appointment of new Governor?
ii) State the grounds of removal of Governor.
iii) State the process of removal of Governor.
iv) Do you think his removal is valid on the said ground?

(Dec, 2019) (1+3+2+1=7 marks)

Answer:

i) Section 27 of the Nepal Rastra Bank Act, 2058 has the provision of acting Governor: So, Government of Nepal shall designate the Senior Deputy Governor of the Nepal Rastra Bank as

Acting Governor to discharge the functions of the Governor in cases where the Governor is unable to discharge his duties due to any reason.

ii) The Governor shall be removed from the office on any of the following grounds:-
(a) If one is disqualified to become a Director pursuant to Section 21; or
(b) The lack of capability to implement or cause to implement the functions which the Bank has to carry out in order to achieve the objectives of the Bank under this Act; or
(c) If one has committed any act causing loss and damage to the banking and financial system of the country; or
(d) If one is found to have acted dishonestly or with mala fide intention in any transaction related to the business of the Bank; or
(e) If professional license is revoked or prohibited from carrying out any profession rendering disqualified to be engaged in any trade or profession on the ground of gross misconduct; or
(f) If one is absent for more than three consecutive meeting of Board without a genuine reason;
Except on the grounds referred to in Sub-section (5), no Governor, Deputy Governor and Director shall be removed from office.

iii) Section 23 has provided the constitution, functions and duties of Inquiry Committee. The Governor is removed from office on the recommendation of such committee. The Committee is constituted as follows:
(a) The person designated by Government of Nepal from amongst the retired Justices of the Supreme Court - Chairperson;
(b) Two persons designated by Government of Nepal from amongst renowned persons belonging to economic, monetary, banking, financial, commercial or management sectors - Member
The Inquiry Committee may, prior to submission of its recommendation to Government of Nepal along with its findings, record the statement and conduct inquiry with, the concerned person. The Inquiry Committee may fix its procedure to be followed in connection with the inquiry. The Inquiry Committee shall submit its recommendation along with its findings to Government of Nepal within one month.

iv) Section 22 has mentioned the grounds for removal of the Governor also. He has to be given reasonable opportunity to defend prior to removal from his office. Before removal there should be grounds and recommendation of an inquiry committee constituted under section 23. If he has not provided the opportunity to defend and removed without any ground and recommendation of the inquiry committee the removal may not be valid. While removing a Governor, the Government of Nepal shall cause to conduct an inquiry by committee and remove him/her from the office on the basis of the recommendation made by the committee. The Governor has removed beyond the process as mentioned in the NRB Act, 2058. There is no any grounds of removal as well as recommendation of inquiry committee. So, the removal is not valid.

Question No. 6:

How does Nepal Rastra Bank act as the Fiscal Agent and Depository of the Government of Nepal? Answer in the light of Nepal Rastra Bank Act, 2058.

[June, 2019](4 Marks)

Answer:

Pursuant to section 69(1) of Nepal Rastra Bank Act, 2058, Nepal Rastra Bank (NRB) shall be the banker and financial advisor of Government of Nepal and a financial agent of Nepal as under:

1) The Government of Nepal shall consult NRB on any matters that are within the jurisdiction of its competence. It shall be the duty of the Bank to advise on matter consulted by the Government of Nepal.
2) Government of Nepal shall, while preparing annual budget, consult NRB on the domestic debt including overdrafts.
3) NRB shall submit a pre-budget review report to Government of Nepal each year on the economic and financial matters.

Pursuant to section 71 of this Act:

1) NRB shall accept the deposits of Government of Nepal or other bodies prescribed by Government of Nepal.
2) While accepting deposits pursuant to Sub-section (1) above, NRB shall receive and disburse monies, keep accounts therein, and provide banking services related thereto.
3) NRB may authorize commercial banks and other financial institutions to conduct the transaction as referred to in Sub-section (2) above subject to the terms and conditions prescribed by NRB.

Functions of NRB as a Fiscal Agent of Nepal are as provided under section 72 of this Act below:
NRB shall, subject to the terms and conditions stipulated in the agreement entered into with Government of Nepal, act as fiscal agent of Government of Nepal on the following matters:-

a) Marketing, purchase and sell of debt bonds issued by the Government of Nepal and to act as registrar and transfer agent therefor;
b) Payment of the principal, interest and other fees of the debt bonds referred to in Sub-section (a) above
c) Other necessary functions to be carried out as the agent.

Question No. 7:

How does Nepal Rastra Bank (NRB) execute supervision and inspection of Banks and Financial Institution(s)? What will be the responsibilities of such Banks and Financial Institution(s) in the course of such supervision and inspection?

[December, 2018] (7 Marks) [June, 2015](5 Marks)

Answer:

Section 84 of Nepal Rastra Bank Ac, 2058 provides following authority and role to NRB to conduct inspection and supervision of banks and financial institutions and imposes certain responsibilities to such banks and financial institutions to abide by the law, rules, regulations and institutions of NRB about the same:

a) The Board shall frame and implement inspection and supervision bye-law confirming to international standard for inspection and supervision of the commercial banks and financial institutions licensed by the Bank.
b) The Bank may, at any time, inspect and supervise or cause to inspect and supervise any of the offices of commercial banks or financial institutions. Such inspection and supervision may be carried out by the deputed official of the Bank or an expert designated by the Bank at the office of the commercial bank or financial institution or by asking the concerned institution to submit detailed particulars and information to the Bank itself.
c) It shall be the duty of the concerned commercial bank and financial institution or Directors, officials or employees of such commercial bank and financial institution to make available the statement, data, record, information, particulars necessary for computer and auditing and other programs and particulars developed through the electric system and financial control system or necessary other documents to such official, expert or the Bank or to enable such official or expert to review or to examine them within the time prescribed by such officer or expert.
d) The inspecting and supervising official or the Bank under this Section may cause to record written statements of any Director, official or employee of the commercial banks or financial institutions with regard to the functions and proceedings which are deemed necessary in course of inspection and supervision.
e) The Bank or the inspecting and supervising official may issue necessary directives to the commercial bank or financial institution on the matters deemed necessary while inspecting and supervising. It shall be the duty of the concerned commercial bank or financial institution to abide by the directives issued by the Bank or by the inspecting or supervising official. The inspecting or supervising official shall inform the Bank as soon as possible about the directives so given.
f) The official or the expert who carries out inspection and supervision as per this Section shall have to submit the report of the inspection and supervision carried out by him/her to the Governor within the stipulated deadline.
g) The report submitted pursuant to Sub-section (6) should be submitted in the next meeting of the Board.
h) The Board may, after making appropriate decision on matters contained in the report submitted pursuant to Sub-section (7), issue appropriate directions to the Governor about the actions to be taken in the matter. It shall be the responsibility of the Governor to implement or cause to implement such directions.

Question No. 8:

Under what conditions, Nepal Rastra Bank can process the work of resolution by taking up any commercial bank or financial institution under its control? Explain.

[June, 2018](7 Marks).

Answer:

Section 88A of Nepal Rastra Bank Act, 2058 (second amendment, 2073) has explained the provision regarding power to resolution. On any of the following conditions, Nepal Rastra Bank can process the work of resolution by taking up any commercial bank or financial institution under its control:

a) If its liability of payment cannot be made fully or partially,
b) If there is condition of not being able to fulfill the liabilities to be paid, on the ground of supervisory analysis, within ninety days from the date of the completion of the work relating to such analysis,
c) If liability exceeds the net assets,
d) If sustained loss that cannot be covered up even by all kinds of capital and funds prescribed by the Bank,
e) If the Bank makes decision to take to the process of resolution as per Section 86 G.

Only the bank shall have the power to carry out, or get the resolution carried out, of the claim of the depositor and secured creditor remained upon any commercial bank or financial institution.

Total expenses incurred while carrying out work relating to resolution of the commercial bank or financial institution shall have to be borne out of the amount received after selling out the properties of the commercial bank or financial institution concerned.

Question No. 9:

Nepal Rastra Bank (NRB) is the economic advisor of the government. As a central bank of the country it intervenes the banks and financial institution in case severe irregularities are found in these institutions. It also dissolves the management of such institutions and take over the management when it deems fit. Based on these aspects answer the following:

i. Under what law NRB is authorized to do such activities?
ii. How far the intervention of NRB is appropriate?
iii. Who are the beneficiaries in such cases?

[June, 2017](10 Marks)

Answer:

Under sections 5 and 79 of NRB Act, 2058, bank has the authority to do so. Section 5(i)(h) & (j) of the act has given authority to central bank for regulation, inspection, supervision and monitoring function on commercial banks. Section 79 of the Act is more specific in this issue to regulate and for the necessary action. The bank has full powers to regulate various functions and activities of commercial banks and financial institutions.

The Bank using the power of Section 79(5) can enforce authority and responsibility granted under this act and any other act enacted for licensing, supervising and regulating commercial banks and financial institutions and to revoke the license of commercial banks and financial institutions and to take over or to provide in trusteeship the commercial banks or financial institutions which have been declared insolvent or are on the verge of insolvency.
The bank also has power to investigate or inspect, or supervise or to cause to investigate, inspect or supervise by any official or the bank or the persona designated by the bank to books of accounts and other records.

The bank further has authority to issue order to the member of the Board or directors, officials or employee of any commercial bank of financial institution to provide necessary information about the bank or institution in cases it is necessary to inspect and supervise the transaction of such bank or financial institution.
It is the duty of the central bank to protect the public money. The central bank while doing so should be convinced that there were severe irregularities in the bank, and it was justifiable to intervene the management of the company. Before intervening these institutions, NRB complies various supervisory, monitoring and inspecting roles entrusted by NRB Act, 2058 for the best interest of these institutions and other stakeholders. Being the economic advisor of the government, and also a banker of the commercial banks and financial institutions the role of the NRB as a Central Bank is very much important and appropriate.

General public are the main beneficiaries, most of them are small investors that are outside the management, and heavily suppressed by the insiders of the company. Among the general public are the customers, depositors, investors, creditors and other stakeholders as well are the beneficiaries.

Question No. 10:
Richmond Commercial Bank Ltd., a public company after few years of its operation, was taken under control by Nepal Rastra Bank (NRB) after suspending its board of directors (BOD). Thereupon, NRB took under its control the management of the Bank and appointed one of its first class officers to manage the business of the Bank. Nearly a year later, Kaziman Rai, a shareholder of Richmond Commercial Bank Ltd. decided to challenge the decision and action of NRB at the court of law claiming that: (a) the suspension of the BOD has blocked convening the annual general meeting of the Bank and as a result of which his legal rights to attend and actively participate in the shareholder's meeting and also get financial information from the Bank are infringed; (b) that the act of controlling the management of the Bank also cancelled the listing of securities along shares of the company caused him obstruction in selling his shares in the market; (c) and also created his share investment in the company at risk. Therefore, he would request the Court to cancel the decision of NRB by cancelling the suspension of BOD and also withdraw the control

of the management of Richmond Commercial Bank Ltd. and let it function on its own by its BOD (suspended).

Now, the fact of the case raised many issues and questions to be answered by a corporate consultant before the shareholder as Mr. Kaziman Rai files a petition at the Supreme Court challenging NRB's decision and the subsequent actions. Based on this background, answer the following questions in the light of NRB Act, 2058:

i. Under which situations NRB may take control over the commercial bank as above?
ii. What procedures NRB must follow before taking control over the management of the commercial bank?
iii. Whether NRB is required to release public information as regards to the taking over control of the commercial bank and its financial status?
iv. How long NRB will continue its control of the management of Richmond Commercial Bank?
v. Whether shareholder Kaziman Rai's allegations against NRB's decisions and actions of taking control of the management of Richmond Commercial Bank are legally sustainable?

[June, 2006](5 Marks)[December, 2016](5×2=10 Marks) [June, 2006](5 Marks)

Answer: (i)

As per section 102(1) of Bank & Financial Institutions Act 2073, notwithstanding anything contained elsewhere in this Act, if the Rastra Bank believes that a licensed institution has violated the this Act or Rastra Bank Act or the Rules or Byelaws framed hereunder or the Orders or Directives issued hereunder or is satisfied, on the basis of the inspection and supervision report of the Rastra Bank, that a licensed institution has failed or is likely to fail to perform the obligations required to be performed by the licensed institution or that a bank or financial institution has not been operated smoothly or has carried out anything contrary to the interests of its shareholders or depositors, the Rastra Bank may suspend the Board of Directors of such licensed institution for a period of maximum three years and take such bank or financial institution under own control.

Answer (ii):

As per section 102(6) of Bank & Financial Institution Act 2073, the Rastra Bank shall, prior to taking a licensed institution under its control pursuant to Sub-Section (1), give an opportunity to the concerned bank or financial institution to defend itself, by providing it with a time-limit not exceeding 15 days, having regard to the situation.

Answer (iii):

a) As per section 102(8) of Bank & Financial Institution Act 2073, the Rastra Bank shall have to inform Government of Nepal, Ministry of Finance about the taking of any licensed institution under its control pursuant to Sub-Section (1).
b) As per section 102(3) of Bank & Financial Institution Act 2073, after taking any licensed institution under its control pursuant to Sub-Section (1), the Rastra Bank may either itself or

through any appropriate person, firm, company or institution appointed by it, carry out the management of such bank or financial institution. Then. Rastra Bank shall, within one year after the management of licensed institution has been carried out by itself or through any other person, firm, company or institution pursuant to Sub-Section (2), conduct or cause to be conducted financial and management audit of such institution and publicly publish a report thereof.

c) If the Rastra Bank is satisfied, from the report referred to in Sub-Section (3), that the concerned licensed institution has become capable of performing the liabilities required to be performed by it or that the institution has reached a stage of operating smoothly, the Rastra Bank may take the following actions:-
   i. To remove the suspension of the Board of Directors of the licensed institution made pursuant to Sub-Section (1) and handover the management of the institution again to that Board of Directors, or
   ii. To dismiss the Board of Directors of the licensed institution which has been suspended pursuant to Sub-Section (1), form a new Board of Directors from amongst the shareholders of the licensed institution and handover the management of that institution to the new Board of Directors, or
   iii. To convene the General Meeting of the licensed institution, get a new Board of Directors formed by the Meeting, and handover the management of the institution to the Board of Directors, or
   iv. To take any other action as the Rastra Bank deems appropriate.

d) If the Rastra Bank is satisfied, from the report referred to in Sub-Section (3), that the concerned licensed institution has become incapable of performing the liabilities required to be performed by it or that the institution has reached a stage of not being operated smoothly, the Rastra Bank may take any of the following two actions:-

i. To initiate the process of mandatory liquidation according to the provisions made in Chapter 12 of the Act, or
ii. To initiate the process of settlement according to the Rastra Bank Act.

e) The concerned licensed institution shall bear all expenses incurred by the Rastra Bank in every act and action taken by it after taking such institution under its control pursuant to this Section.

Answer (iv):

As per section 102(1) of Bank & Financial Institutions Act 2073, the Rastra Bank may suspend the Board of Directors of such licensed institution for a period of maximum three years and take such bank or financial institution under own control.

Answer (v):

The above question answer from (i) to (iv) has sufficiently clarified that taking control of the management of Richmond Commercial Bank Ltd. was a compulsive decision and action of NRB and was a genuine act under the provisions of section 102 of Bank & Financial Institution

Act 2073, as there was sufficient evidence of mismanagement on the part of that Bank which led NRB to take such decision or action in order to discipline that Bank and safeguard the interests of its shareholders, depositors and the creditors. NRB has pursued due process of law as required by afore stated section before or after taking control of the management of that Bank. Accordingly, it provided appropriate opportunity of representation to that Bank, it reported to the government of NRB's steps, it caused audit of the accounts of that Bank, published its report. In addition to that, if the investigation report as above became negative it could apply to the High Court for cancellation of that Bank, or if the report is positive than it could withdraw suspension of BOD and require it to run the Bank by itself or may dismiss the BOD and form a new BOD from the Shareholder's meeting, or could take any action as appropriate.

Hence, he cannot challenge the decision and action of NRB, as the NRB Act, 2058 has not conferred such right to him.

Question No. 11:

Nepal Rastra Bank has decreased the capital of Yari Finance Limited applying the power as mentioned in Section 86I of Nepal Rastra Bank Act, 2058. Some of the shareholders of the finance company are interested to appeal against the order of the Bank to the committee using the power as defined in 86I of the same act. Point out the procedures to apply the case to the committee as mention in the act.

[December, 2015](5 Marks)

Answer:

Section 86 I of Nepal Rastra Bank Act, 2058 has provided the authority to the representative of shareholders to appeal against the order of the Bank as follows:

1) Only the representative of shareholders of the commercial bank or financial institution can appeal to the Management Committee within fifteen days against the action, order, decision or Proceedings of the bank or the official appointed by the bank, under Section 86C, 86D, 86E, 86F and 86 H, if not satisfied with such action, order, decision or proceedings.
   Clarification: For the purpose of this Section "shareholders representative" means representative elected among the shareholders having minimum twenty five percent of prevailing share.
2) No appeal will be entertained without having the representation of twenty five percent of prevailing shares within the time of Sub -section (1)
3) In case of the appeal under the provision of Sub - section (1), the committee has to approve, review or cancel the action, order, decision or proceedings done by the bank or the official appointed by the bank, within thirty days of receipt of such appeal by giving related proof, basis and reasons.
4) Bank may provide information about the decision made under Sub- section (3) within fifteen days of such decision to the respective representative of the shareholders.

5) The action, order, decision or Proceedings of the bank or the official appointed by the bank shall remain continue unless the committee under Sub-section (3) cancel it.
6) The decision of the committee under Sub - section (3) on the appeal of of the shareholders representative shall be final.

Question No. 12:
Management Committee of Nepal Rastra Bank.

[December, 2014](5 Marks)

Answer:
Section 33 of Nepal Rastra Bank Act, 2058 has defined the Management Committee as follows:

1) There shall be a Management Committee, to remain under the Board to be chaired by the Governor in order to conduct the business of the Bank in a smooth manner. The two Deputy Governors shall be other members of the Management Committee, and one senior officer of the Bank designated by the Governor shall act as the member - secretary of the committee.
2) The functions, duties and powers of the Management Committee formed pursuant to Sub - section (1) shall be as prescribed.
3) Notwithstanding anything contained in Sub - section (1), the Governor may invite any of the officers to take part in the meeting of the Management Committee.
4) The Committee shall, in connection with discharging its functions, evaluate the country's monetary and financial condition on a periodic basis. For this purpose, the Management Committee shall, at least once in a month, submit a report to the Board on the Bank's administration and operation, operation of monetary and other regulatory policies, the soundness of the banking system of the country, condition of money, capital and foreign exchange market, implementation of such policies and impact they may have and situation on the banking system, and on the significant events.

Question No. 13:
What is blacklisting? What are the functions of Credit Information Center? Answer in the light of Nepal Rastra Bank Act, 2058.

[December, 2013](5 Marks)

Answer:
Blacklisting is used as a coercive weapon by the regulator to the willful defaulter of bank due. In Nepal, this is a list maintained by the Credit Information Bureau on the basis of information provided by banks and financial institutions under the provision of directives issued by Nepal Rastra Bank (NRB) and the NRB Act, 2058. The objective of the list is to pressurize the defaulter for repayment to the bank and provide the information to the information needy person about the defaulter of the bank debt. This Bureau was established by the Nepal Banker's Association and

NRB. According to section 88 of the NRB Act 2058 following are the functions of Credit Information Bureau;

i) To obtain information on the flow of credit from banks and financial institutions in order to ensure fairness and appropriateness in credit flow.
ii) To require the exchange of the information received pursuant to clause (a) above amongst the banks and financial institutions for the purpose referred to in that sub-section.
iii) To require to send the name-list of the debtors not repaying the loan in time or misusing the loan to the Bureau.
iv) To require to obtain on compulsory basis the information from the Bureau prior to making investment or advancing loan of an amount more than the limit prescribed by the Bank.
v) To have the name-list received pursuant to clause (iii) blacklisted by the Bureau upon confirmation, and to take necessary action in this regard.
vi) To submit report of the bank, on the exchange of information among the banks and financial institutions and use such information while making loan investment on the basis of inspection, supervision and monitoring.
vii) Thus, the Bureau receives information regarding default from different banks and financial institutions to prepare the blacklist. Nepal Rastra Bank by using its statutory authority has issued the directives relating the blacklisting of defaulter and person involved in the financial irregularities.

Question No. 14:

Appropriation of net profit of Nepal Rastra Bank.

[June, 2013](5 Marks)[December, 2008](5 Marks)

Answer:

Section 41 of Nepal Rastra Bank Act 2058, provides for appropriation of Net Profit of the Bank as follows:

1) The amount equal to revaluation profit from the net profit shall have to be separated and kept in revaluation reserve fund.
2) Five percent distributable amount of the net profit remained after separating the amount as per Section (a) shall have to be kept in monetary liability fund; the amount fixed by the Board so as not to be reduced from ten percent in general reserve fund; five percent amount in financial stability fund and the amount as fixed by the Board shall have to be kept in net accumulated savings fund.
3) After the amount is appropriated as per Section (b), the Board shall have to submit the rest of the amount remained after appropriating the amount to other funds from the rest of the saving to the Government of Nepal.
4) While allocating the amount in the general reserve fund, an additional amount shall have to be appropriated to cover up to the capital expenses as well referred to in the annual budget of the Bank.

The amount of general reserve fund and accumulated savings fund can be used for the sake of increasing the capital of the Bank as well.
Regarding the amount, except what is allocated to the funds as per Sub-Section (1) and (2), it shall be as per the provision made in the Rule.

Question No. 15:
How the Audit Committee as per Nepal Rastra Bank Act be formed? Define the functions, duties and power of the Audit Committee formed under the Act.

[December, 2012](5 Marks)

Answer:
Section 34 of Nepal Rastra Bank Act, 2058 has made provisions regarding the formation of Audit Committee in Central Bank of Nepal. As per the provision, the Board shall constitute an Audit Committee comprising of the following members which will be accountable to the Board:-

(a) One Director – Convenor
(b) One subject expert designated by the Board - Member
(c) Chief of Internal Audit Department of the Bank – Member

Section 35 of the Act has defined various functions, duties and powers of the Audit Committee. As per this Section the functions, duties and powers of the Audit Committee shall be as follows:-

a) To submit its report and recommendations to the Board on accounts, budget and audit procedures and control system of the Bank;
b) To ascertain whether or not the audit and preparation of periodic balance sheet and other documents of the Bank have been carried out properly;
c) To supervise the implementation of the appropriate risk management adopted by the Bank;
d) To audit managerial and performance of works of the Bank in order to be assured that the prevailing laws applicable to the Bank have been fully complied with;
e) To frame bye-law for auditing of the Bank in accordance with the prevailing laws and international auditing standard and to submit it to the Board for approval.

The Audit Committee shall, while submitting the report and recommendations to the Board pursuant to Clause (a) of Sub-section (1), furnish the information thereof to the Governor.

Question No. 16:
What kind of reformative measures as per section 86E of Nepal Rastra Bank Act, 2058, can the official appointed by Nepal Rastra Bank be taken to solve the problem as found out from the inspection of the bank by NRB team?

[Final/June, 2012](5 Marks)

Answer:
Section 86 E of the NRB Act, 2058 states the followings:

1) Whatever may be mentioned in the Companies Act or other prevailing law, the bank itself or with the prior approval of the bank the official appointed by the bank can initiate one or more than one of the following actions for the purpose of restructuring of any problematic commercial bank or financial institution which is under the control of the bank by order issued under the provision of Clause (o) of Sub-section (1) of the Section 86C:
   (a) To cancel or suspend any transaction operating within or outside Nepal.
   (b) To sell the assets of such commercial bank or financial institution to any other commercial bank or financial institution in terms and conditions determined by the bank.
   (c) To terminate the employment of the employees working in such commercial bank or financial institution and to appoint new employees in their place as per necessity.
   (d) To merge such commercial bank or financial institution with other commercial bank or financial institution or arrange to transfer the assets and liabilities of such commercial bank or financial institution partially or whole to any other commercial bank or financial institution or any other body.
   (e) To increase the capital, being based on the standard determined by the bank, by selling the share to other person to reduce the participation of the present shareholders or to restructure such commercial bank or financial institution by reshuffling the board of directors.
   (f) To reduce the capital reflecting the actual price of real assets of such commercial bank or financial institution under the provision of Section 86H and determine the face value of the shares in the proportion of reduced capital.
   (g) To do necessary managerial restructure or corporate restructure by closing the branches and transactions which are not properly running for the protection of the interest of the depositors, shareholders, creditors and general public.
   (h) To implement or cause to implement other measures determined by the bank to make competitive for the problematic commercial bank or financial institution.
2) The reasonable opportunity of hearing should be provided to any commercial bank or financial institution before taking any decision under Clause (f) or (g) of sub Section (1).
   Provided that, if the bank feels that prior opportunity of hearing can make negative effect to the interest of its depositors, shareholders, creditors or general public, the bank can provide the opportunity of hearing as soon as possible after making such decision and if the bank satisfied with the reason and basis presented during the time of hearing it can change or repeal the decision as per necessity.

Question No. 17:

Fraud under Nepal Rastra Bank Act, 2058.

[June, 2012](5 Marks)

Answer:

Section 95 of Nepal Rasta Bank Act 2002 renders the following acts deemed to be the offence of fraud under the Act. Whoever accepts deposits or gives credits or issues debenture or other

financial instruments in contravention to this Act or the Rules or bye-law framed thereunder or an order or directive issued thereunder; or

a) Whoever charges or gives interest against the policy determined by the Bank or
b) Whoever issues fake, fraudulent, counterfeit or duplicate or copied currency or distributes or circulates such currency or is involved in such acts or instead of obtaining license from the Bank as per existing law, if transaction is made without obtaining it, or
c) If obstruction is posed on the process of clearing and settlement as per Chapter-9 A., it shall be deemed to have committed offences under this Act.

Except otherwise provided under Sub-section (1) any person who fail to comply with the provisions made under this Act or rules made thereunder, or bye-laws, or the order or directives issued thereunder, shall commit offence under this Act.

Question No. 18:

Under what circumstances Nepal Rastra Bank can declare any Commercial Bank or Financial Institution as Problematic? Explain referring the provisions of related Acts.

[Final/December, 2011](10 Marks)

Answer:

Section 86B of Nepal Rastra Bank Act, 2058 prescribes about the problematic declaration of bank or financial institution.

As per section 86B(1) of Nepal Rastra Bank Act 2058, Nepal Rastra Bank shall declare any commercial bank or financial institution problematic by providing written notice to it when bank is convinced that the following conditions are prevailing in any commercial bank or financial institution on the basis of information received:

i. Under Section 86A.
   Section 86A states that commercial bank or financial institution shall inform to the bank within fifteen days about the situation of insolvency or state of dissolution under the prevailing law or incapability to pay the debt or materially unable to discharge any or all liabilities by any commercial bank or financial institution, or
ii. From the report of inspection and supervision conducted under Section 84 or from any other means.

Conditions for declaring problematic:

a) In case any action against the interest of the depositors, shareholders, creditors, or general public is evident,
b) In case of not fulfillment of any financial liabilities or not having probability to do that or not payment of due amount,
c) In case of insolvency or going to be insolvent or facing material financial difficulties,

d) In case of non-compliance with or breach of this Act, prevailing law related to bank and financial institution, other prevailing law, terms of license or regulation, directives or order of bank,
e) In case it is evident that the license has been obtained on the basis of submitting false, fraudulent, wrong document or data,
f) In case of inability to maintain the capital fund as per this Act, prevailing law related to bank and financial institution and directives issued by the bank at time to time,
g) In case of the initiation of legal proceedings for liquidation or resolution or insolvency of any commercial bank or financial institution under the prevailing law,
h) In case of undue delay in the process of voluntary liquidation where such proceeding has been initiated,
i) For the commercial bank or financial institution established with the joint venture of the foreign commercial bank or financial institution, while such foreign commercial bank or financial institution is insolvent or liquidator is appointed for the liquidation or the license of such commercial bank or financial institution is terminated under the provision of the law of respective country or transaction is banned either fully or partially or where it is evident that operation of banking transaction is done in association with such commercial bank or financial institution, or
j) If the bank is convinced that commercial bank or financial institution is unable to pay its due or can make negative effect in its liability or duties, which it has to perform.

Question No. 19:
How does Nepal Rastra Bank mobilize Foreign Exchange Reserve? Explain it in the light of Nepal Rastra Bank Act, 2058.

[June, 2011](5 Marks)

Answer:
In pursuance to section 66 of NRB Act, 2058, NRB shall mobilize Foreign Exchange Reserve in the following manner:

1) NRB 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 NRB;
   (b) Foreign currencies held by or for the account of NRB;
   (c) Foreign currencies held in the accounts of NRB on the books of a foreign central bank or other foreign banks;
   (d) Special drawing rights (SDR) held by NRB 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 NRB;

(f) Any forward purchase or repurchase agreements of NRB concluded with or guaranteed by foreign central banks or public international financial institutions, and any futures and option contracts of NRB 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 NRB's capital and liquidity to maximize earnings.
3) NRB shall maintain international reserve at a level, which shall be adequate for the execution of monitory 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, NRB 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, NRB shall make further such report and recommendations to Government of Nepal.
6) NRB shall hold the foreign exchange reserve referred to in sub-section (1) in its balance sheet.

Question No. 20:

What are privileges and facilities to Nepal Rastra Bank under the Nepal Rastra Bank Act, 2002?

[Final/June, 2011](5 Marks)

Answer:

Privileges and Facilities to NRB have been provided under section 8 of the NRB Act, 2002, as under:

Notwithstanding anything contained in the prevailing laws, NRB shall be entitled to the following privileges and facilities:-

(a) Exemption from all types of taxes, fees and charges on the incomes, capital transactions, land and houses, assets, etc.;
(b) No requirement for the payment of registration fee for registration of the deeds of loan or refinance to be given by NRB;
(c) No requirement of revenue stamps on any of the documents relating to NRB;
(d) There would be no tax, fee, charge, duty on the export and import of bank notes, coins, gold, silver and the paper, metal, chemicals, and other materials to be used for printing bank notes and minting coins.

Question No. 21:
Pre-emptive Rights of Nepal Rastra Bank.

[December, 2010](5 Marks)[June, 2007](5 Marks)

Answer:
Pre-emptive rights mean the first right of the all others. In the scenario of pre-emptive rights of Nepal Rastra Bank under section 8 of Nepal Rastra Bank Act 2058, realization of any credit supplied by the bank to any debtor, or any other claim of the bank, the bank shall have pre-emptive rights to secure its claim as follows:

1) For the purpose of recovering any loan, which the Bank has given to any borrower or any other type of claim of the Bank against any borrower, the Bank shall have prior right of security over cash deposited in an account in the name of such borrower at the Bank or in any commercial bank or financial institution or against any other movable and immovable property owned by the borrower for the purpose of recovering such loan.
2) The Bank shall recover its loan by taking into its custody the cash or movable or immovable property having its prior right and selling such property as prescribed.

Question No. 22:
The Board of Directors of Knowledge Co-operate Society Ltd. has obtained its license for doing Banking Business (receiving deposits & lending them) from the Nepal Rastra Bank which cancelled its license for violating its directives on Loan loss Provisioning. Discuss the legal issue from the view point of both the organizations.

[December, 2010](6 Marks)

Answer:
Under Section 100 of the Nepal Rastra Bank (NRB) Act 2058, it may impose a ban on receiving deposits & lending money on the ground of violating any directive of the NRB. Thus the cancellation of the license is within the jurisdiction of the NRB.
Also under section 102 of the NRB Act the Co-operative Society can appeal to the Appellate Court & the decision of the court shall be final whether to reissue the silence or not.

Question No. 23:
Composition of Board of Directors of Nepal Rastra Bank

[June, 2008](5 Marks)

Answer:
Section 14 of Nepal Rastra Bank Act, 2002 provides the composition of Board of Directors of Nepal Rastra Bank, as per which the NRB shall have a Board of Directors comprising of the following members:

i.	Governor	Chairman
ii.	Secretary, Ministry of Finance	Member
iii.	Two Deputy Governors	Member
iv.	Three Directors appointed by GoN from among reputed persons from economic, monetary, banking, financial and commercial law sectors	Member

Question No. 24:

Nepal Rastra Bank recently circulated 5 million numbers of bank notes of Rs. 1000 denomination. It was found later that 50 thousand, out of 5 million issued notes, were defective. NRB immediately published a notice to the general public informing that some of the issued notes are defective and hence such defective notes should be presented to the NRB for reimbursement within 35 days. The notice also mentioned clearly that after the specified period, the Bank shall not be liable to reimburse defective notes and such notes shall not be considered as legal tender:

i) Examine the validity of NRB's notice in the light of Nepal Rastra Bank Act, 2002.

ii) Mr. Careless who possessed 50 numbers of such defective notes forgot to present such notes within the time specified in the notice. He wants to either present the notes for reimbursement or use them to meet his monthly expenses. Advise Mr. Careless.

[June, 2008](5 Marks)

Answer:

Section 60 of the Nepal Ratra Bank Act provides the provision regarding the power to withdraw or take back bank notes or coins in circulation.

Accordingly, sub-section 1 of section 60 provides that the Bank may withdraw or take back bank notes and coins that are in circulation in the Nepal for reimbursement. The Bank shall publish public notices clearly specifying the number of days within which, the bank notes and coins which are being withdrawn or taken back, are to be presented for reimbursement and the office of the bank at which they are to be presented.

Sub-section (2) provides that notwithstanding anything contained in Section 53 of the Act, bank notes and coins that are notified for presentation to the Bank for reimbursement shall not be legal tender after the expiry of the period mentioned under sub-section (1).

In the given case, Nepal Rastra Bank has published a notice for reimbursement of defective bank notes which are in circulation. This is a valid notification within the power of the bank under section 60 of the Act.

The time limit to present the defective notes has been specified as 35 days and after this period the bank notes shall not be the legal tender. In the given case, Mr. Careless did not present the defective notes within the period specified and hence such notes in his possession will not be legal tender. He, therefore, can neither use nor present such notes for reimbursement after the expiry of the stipulated time limit.

Question No. 25:

Security against issue of bank notes.

[December, 2007](5 Marks)

Answer:

Nepal Rastra Bank shall issue notes only after keeping a security against such notes. Section 52 of Nepal Rastra Bank Act, 2058 prescribes about the security against the issue of bank notes as follow:

1) As per sub-section (2) of the Act, he Bank shall issue notes only against the security, and the liability of such issued notes shall be equal to the value of property kept as security. At least fifty percent of the property to be kept as security shall be one or more of gold, silver, foreign currency, foreign securities, and foreign negotiable instruments and the remaining percentage shall be one or more of the coins (Mohar Double or coins of higher denomination, the Debt Bond issued by GoN, the promissory note or bills of exchange payable in Nepal within a maximum of eighteen months from the date of repayment by bank. Provided that with the permission of the GoN the ratio of property kept as security may be at least forty percent one or more of gold, silver, foreign currency, foreign securities, and foreign bills of exchange and the remaining percentage shall be one or more of the coins (Mohar Double or coins of higher denomination, the Debt Bond issued by GoN, the promissory note or bills of exchange payable in Nepal within a maximum of eighteen months from the date of repayment by bank.

2) For the purpose of Sub-section (2), the valuation of property shall be made as follows:-
   (b) The price of gold at the rate fixed by Government of Nepal on the recommendation of the Board;
   (c) The price of silver at the rate deemed appropriate by the Board;
   (d) The foreign currencies at the exchange rate fixed by the Bank;
   (e) The Debt Bond issued by Government of Nepal, the foreign securities and negotiable instruments at the rate deemed appropriate by the Board on the basis of market rates;
   (f) Coins at the rate of face value.
3) The Bank shall issue the bank notes of various denominations as may be necessary. While issuing banknotes in this way, the pictures appearing in the notes, size and denominations shall be as approved by Government of Nepal and the pictures invisible at note, internal security arrangements, the materials for printing banknotes and other materials shall be as decided by the Board.
4) Government of Nepal may, in consultation with the Board, declare that banknote of any denomination shall cease to be legal tender in any place other than the prescribed place or office having published a notification in the Nepal Gazette.
5) The Bank shall not reissue the notes, which are torn, defaced or excessively soiled.

6) As per sub-section (9), the Bank shall be responsible for payment of the banknotes issued by the Bank and the banknotes issued by Government of Nepal prior to the establishment of the Bank.
7) As per sub-section (10), no liability other than the liability referred to in Sub-section (9) shall be borne from the property given as security for issuance of banknotes.

Question No. 26:
Who can maintain accounts with Nepal Rastra Bank? Can individuals also keep their savings in Nepal Rastra Bank?

[June, 2007](5 Marks)

Answer:
As per Section 13 of the Nepal Rastra Bank Act, 2002 permits Nepal Rastra Bank to open and operate accounts for Government of Nepal and other governmental bodies, commercial banks and financial institutions, public corporations, foreign missions, foreign central banks, foreign banks and international organization and institutions.
But the Bank cannot operate accounts for individual, industry or political organization.

Question No. 27:
Duties of Governor of Nepal Rastra Bank.

[December, 2006](5 Marks)[December, 2004](5 Marks)

Answer:
Section 30 of the Nepal Rastra Bank Act, 2058 prescribes about duties of Governor of Nepal Rastra Bank.As per section 30(1) of the Act, the duties of the Governor shall be as follows:-

(a) To implement the decisions made by the Board;
(b) To operate and manage the Bank;
(c) To systematize the functions to be carried out by the Bank;
(d) To represent and cause to represent on behalf of the Bank in international organizations and associations;
(e) To implement and cause to implement the policies relating to monetary and foreign exchange matters;
(f) To formulate necessary policy on rates of interest for deposits and loan with commercial banks and financial institutions;
(g) To formulate necessary policies with regard to the rates of interest to be paid by commercial banks and financial institution on deposit and loan or the rate of interest to be charged by them on deposits and loan;
(h) To formulate necessary policies relating to liquidity to be maintained by commercial banks and financial institutions;

(i) To make necessary arrangement with regard to the basis, amount, methods, conditions and duration of compulsory deposit to be maintained by commercial banks and financial institutions, and its use;
(j) To fix the terms and conditions relating to adequacy of the capital fund of commercial banks and financial institutions;
(k) To take decision with regard to the procedures and terms and conditions to be followed while purchasing and selling gold and other precious metals;
(l) To fix the charge on the services to be provided by the Bank;
(m) To take decision for opening and closing branch offices and other offices of the Bank as may be necessary;
(n) To establish and close the agency of the Bank;
(o) To make necessary arrangement for development and operation of information system of the Bank;
(p) To make necessary arrangement for supervision of commercial banks and financial institutions;
(q) To take decision with regard to revocation of the license provided to commercial banks and financial institutions;
(r) To take decisions on any other matters subject to the powers delegated by the Board of Directors;

Question No. 28:
Mr. Hopeful has raised a claim with Nepal Rastra Bank for reimbursement of Rs. 1,00,000/- which he lost on a fire at his home in the presence of two witness. Is the NRB obliged to make the reimbursement? Would your answer be different were a portion of the burnt notes available and submitted to NRB?

[June, 2006](5 Marks)

Answer:
Section 57(4) of Nepal Rastra Bank Act, 2002 provides that owners of bank notes or coins which are lost or stolen shall not be entitled for reimbursement by the NRB. Hence, NRB is not obliged to make payment to Mr. Hopeful on his claim, even if supported by witnesses.
A combined reading of Sub-section 1 and 2 suggest that the Bank may withdraw, destroy or exchange with other bank notes or coins those currency notes that are worn out or torn out (missing) to the extent of 50%. Hence, if the protion not destroyed by fire is more than 50%, a valid claim for reimbursement may be raised.

Question No. 29:
In the year 2060/2061, the collected revenue of HMG/N was around Rs. 60 million, the value of the overdraft from the Nepal Rastra Bank & the total value of the government bonds (all types)

earned by the NRB in the year 2061/2062 were Rs. 5 billion & Rs. 8 billion respectively. Examine the case in terms of the specific provisions of the NRB Act 2058 BS.

[December, 2005](5 Marks)

Answer:

Under section 75 (5) of the Nepal Rastra Bank Act, 2058 the value of overdraft cannot be more than 5% of the last year's revenue collection i.e. 5% of Rs. 60 million i.e. Rs 3 billion & in the same way the NRB holdings of government bonds cannot be more than 10% of Rs 60 million i.e. Rs 6 billion as per section 75(7) of the Act.

However, In the following circumstances, the debt bond issued by Government of Nepal and purchased by the Bank shall not be treated as the credit extended under Sub-section (7):-

(a) If the purchase is made in the secondary market for the operation of open market consistent with monetary policy of the Bank;
(b) If the purchase is made in the primary market, when it is necessary in the opinion of the Bank, to maintain stability in the market at the time of primary issue of such securities and such securities are divested within 60 days of purchase.
(c) The debt bond purchased by the Bank from GoN & retained in its ownership prior to the commencement of Subsection (7).

In both case the limit has been exceeded by the government. So there is a violation of law by the government the prescribed limit must be returned at the earliest.

Question No. 30:

Both the Deputy Governors of the Nepal Rastra Bank are retiring in Asar 2062. Your opinion is sought on the following issues with regard to the new appointment.

i. What is the tenure of service of the Deputy Governor?
ii. How many candidates should be recommended and who are the recommending and appointing authorities?
iii. Can Mr. Gurung, a Chartered Accountant with a M.Sc. in economics and having 20 years of executive level experience in commercial banking but holding 3% stake in Rich Bank Ltd. be appointed as one of the Deputy Governors?
iv. Can a Deputy Governor in office be removed from his post for not attending Board Meeting of the Bank?

[December, 2005] (1+2+1+1=5 Marks)

Answer:

i. As per section 8 (1) of the Nepal Rastra Bank Act, 2002, the tenure of service of the deputy governor is five years.

ii. The Governor should recommend four candidates i.e. double the number of vacant posts {section 16 (2)}

iii. As per sub-section 2 of section 16 of the Act, the Governor can only recommend candidates for appointment of deputy governor from among special class officers of the Rastra Bank. Hence Mr. Gurung is not eligible for appointment.

iv. A deputy governor in office is liable to be removed from his post if he remains absent in more than 3 consecutive Board meetings without appropriate reason {section 22 (5) (f)}.

Question No. 31:

What is the quantum and composition of security that NRB is required to maintain to issue currency notes and coins? Can NRB utilize this security to meet any of its liabilities?

[June, 2005](5 Marks)

Answer:

i. Bank Note:

Same type of question was asked in December, 2007 as well for 5 marks.

ii. Coins:

As per section 52(7), the Bank may, with the approval of Government of Nepal, mint and bring into circulation the coins of whatever metal or mixture of metals or bring into circulation having minted them in Mint on specials occasions. The Bank may, if it deems appropriate, cause such coins minted in any foreign Mint.

Provided that, if coins minted once with the approval is to be re-minted, no approval of Government of Nepal shall be required.

As per section 52(8), the Bank may, with the approval of Government of Nepal, mint the coins sent for minting by a foreign government.

Question No. 32:

The Governor of Nepal Rastra Bank is retiring in Magh 2061 after the completion of his second term in office. The following questions have arisen with regards to the new appointment and your opinion is sought:

i. Is the retiring Governor eligible for re-appointment?
ii. What is the educational qualification required for the appointment?
iii. Can the incumbent be a shareholder of a Commercial bank?
iv. How many candidates should the Recommendation Committee recommend and who is the final appointing authority?

[December, 2003](1+1+1+2 = 5 Marks)

Answers:

i. The retiring Governor is not eligible for re-appointment since he has already served his second term (Section 18 (2) of Nepal Rastra Bank Act, 2002)

ii. As per section 20 (c) of the Act, one must have acquired at least a post graduate degree in economics, monetary, banking, finance, commerce, management, public administration, statistics, mathematics or law.

iii. The incumbent should not be holding shares or voting rights equivalent to more than 5 percent of any commercial bank or financial institution (section 21 (d).
iv. As per section 15 (3) the Recommendation Committee should recommend the names of three persons for the appointment of the Governor.

CHAPTER-6

INDUSTRIAL ENTERPRISES ACT, 2076

[Note: All answers suggested hereby have been updated as per Industrial Enterprises Act, 2076]

Question No.:1;
After the seventh Constitution promulgation three tiers of government system has been applied in Nepal. This system bears an impact on every sector of corporate life and among them the industrial sector is one. Accordingly, the industrial administration has been transferring in the federal to province level. Concerning the industry registration, how the Industrial Enterprise Act, 2076 has managed the industry registration provision in the Federal and Provincial level simultaneously? State the concerned legal provisions provided under the Act. **(December 2022) (7 Marks)**

Answer:
Obviously, the industrial administration has been transferring through federal to provincial level after the promulgation of the Constitution of Nepal. Such transferring has been carried out through Industrial Enterprise Act, 2076. Section 4 has provided on the matter of the provision relating to registration of industries. In accordance with the provision mentioned in the section 4, the registration provision has been as follows in the federal vis-à-vis provincial level.

Application: Subsection 1

A person, firm or company that intends to establish any of the following industries under this Act shall make an application to the Department (of Industry in Federal Level) for registration in such a form and accompanied by such documents as prescribed:

- an industry mentioned in Schedule-1 that requires permission;
- an industry established with foreign investment;
- an industry related to any matter set forth in Schedule-5 of the Constitution of Nepal;
- an industry that falls under the jurisdiction of two or more Provinces;
- an industry related to academic consultancy services on diplomatic affairs.

Application through electronic means: Subsection 5

The details or documents to be attached with an application to be made under subsection (1) may also be submitted through electronic means (online), and the relevant documents may be authenticated by a digital signature.

Interim industry administration: Subsection 3

Notwithstanding anything contained in subsection (2), the Federation shall carry out acts relating to the administration of industries including the registration, renewal and regulation of the industries subject to registration, renewal and regulation by the Provincial Government until the concerned Provincial Government makes law on such industries.

Limitation on particular industries establishment and operation: Subsection 4

Notwithstanding anything contained in subsections (1) and (2), industries generating atomic energy, radio-active materials, and industries related to atomic energy and uranium-based energy.

Information to submit remain details or documents: Subsection 6.

When examining an application received under subsection (1), it appears that any required details and documents are not submitted, the industry registration body shall immediately inform the applicant to submit such details or documents within a maximum period of ninety days.

Rejection of registration: Subsection 7

If the applicant fails to submit the details or documents demanded under subsection (6) or it does not appear that the procedures under this Act or the rules framed under this Act are met, the industry registration body may, by setting out the reasons, reject the application for industry registration. If decision is made to reject, it shall give written information thereof, setting out the reasons, to the concerned applicant within five days after the decision.

Provincial industrial administration: Subsection 2

The concerned Provincial Government shall carry out acts relating to the administration of industries including the registration, renewal and regulation of industries other than the industries under sub section (1). Provided that, permission shall be obtained in the industry as prescribed in schedule-1 in the case of an industry requiring permission.

Application to the industry registration body of concern province: Sub section 8

A person, firm or company that intends to establish an industry other than an industry mentioned in subsection (1) shall make an application to the industry registration body of the concerned Province for registration of the industry, accompanied by such details and documents as provided in the Provincial law.

Question No. 2:

Nepal Securities Printing Press Ltd. has been established in June 2021 after availing permission from Department of Industry. Mr. Sanjay Rai, an advocate, filed a writ petition in Supreme Court against the company and Department of Industry (DoI) demanding that the permission given to the company to be made void being inconsistent with the legal provisions as set forth in the Industrial Enterprise Act, 2076. Director General of DoI consults you as a legal consultant in the following matters: **(December 2021) (3+3+1=7 marks)**

i) What kind of industries require to take permission prior to registration?

ii) What is the process and provision regarding obtaining permission?

iii) Is the permission given to the security press valid?

Answer:

i) Industries requiring permission as set forth in the section 8 and Schedule 1 of Industrial Enterprises Act, 2076 are as follows :

1. Industries producing arms, ammunition, gunpowder or explosives;
2. Security printing, bank notes and coin industries;
3. Industries producing cigarette, bidi, cigar, chewing tobacco and other goods utilizing tobacco as the basic raw materials, and electronic cigarettes;
4. Microbrewery, beer, alcohol, or alcoholic substances producing industries;
5. Stone, ballast, sand excavation, processing industries;
6. Industries producing radio communication equipment;
7. Industries like excavation of precious minerals and petroleum products;
8. Liquefied petroleum gas (L.P.G) refiling industries;
9. All kinds of industries producing drone products or providing services through drone;
10. Other industries requiring permission under the prevalent laws.

ii) **Process of Permission to be obtained:**

Section 8 of the Industrial Enterprises Act, 2076 provides the following process:

1. Notwithstanding anything contained elsewhere, permission shall be obtained from the Industrial and Investment Promotion Board (Board) prior to registering any industry mentioned in Schedule-1. Provided that permission shall be obtained from the Government of Nepal, Council of Ministers, prior to registering any industry mentioned in serial number 1 of that Schedule.
2. A person who intends to register an industry requiring permission under subsection (1) above shall make an application to the Board through the industry registration body in such a form and accompanied by such details as prescribed.
3. If, when examining the application and relevant documents under subsection (2) above, it appears that the required details or documents are attached, the industry registration body shall submit the matter, along with its opinion, to the Board for decision within seven days.
4. The Board shall decide to or not to give permission for the registration of industry with respect to the application received under subsection (2) within thirty days.

5. When deciding to give permission under subsection (4), the Board may also specify necessary additional terms and criteria.
6. If the Board decides to give permission under subsection (4), the Department shall provide a permit in the prescribed form, along with notice of the decision, to the concerned applicant within five days after the making of the decision.
7. A person who obtains permit under subsection (6) above shall apply to the industry registration body for the registration of industry within 10 the period mentioned in the permit. If no application is made within such specified period, such permit shall ipso facto become inoperative.
8. If the Board decides not to give permission for the registration of industry under subsection (4), the industry registration body shall give notice thereof to the applicant within five days after the making of the decision.
9. An applicant who obtains permit under subsection (6) shall not sell or dispose of the permit, transfer the right or change the ownership in it in any manner, prior to the commencement of operation, commercial production or transaction of the industry. Provided that if any applicant dies prior to the commencement of operation, commercial production or transaction of the industry, nothing shall prevent his or her heir under the prevailing law from performing the remaining acts in the capacity of applicant.

iii) **Validity of the permission:**

It is a valid decision that the industries of securities printing has required and given permission pursuant to section 8(1) and Schedule 1 of this Act. The industries as listed in the schedule 1 should take permission from Industrial and Investment Promotion Board. The demand of Advocate is true and valid due to the compliance of the law. Therefore, the decision made by the Department of Industry to give permission to the Company is invalid and inconsistent with the Industrial Enterprise Act, 2076.

Question No. 3:

Industrial Enterprises Act, 2076 has been enacted for the protection and promotion of industrial establishments and also for the promotion of investment with a view to speed up of the industrialization by making the simple policy in Nepal. State the legal provisions regarding the registration and regulation of an industry under the Industrial Enterprises Act, 2076.

(June, 2021) (7 marks)

Answer:

Like the previous legislation of 2073, the Industrial Enterprises Act, 2076 (IEA) makes it mandatory for all the business activities falling under the definition of "industry' as per Section 17 to be registered as an industry. According to Section 3 of the Act, no one can establish or cause to establish industry or operate it without its registration.

For registration of industry it has to fulfill all the requirements as similar to the registration of a company, by making an application either manually or online service with required documents and fees. The new enactment permits to make an application by online.

IEA, 2076 has introduced a new concept of unit industry, eliminating the concept, use and practice of branch industry. Any industry desirous of operating an industry or production at a different location from that of the main industry shall do so by registering a unit of the industry. IEA 2076 further requires every industry to register their existing branch industries as separate industries within a year of commencement of this legislation.

Registration of a unit industry shall follow the same process for registration of a new industry and the record of production, transaction and accounts shall be maintained in a unified form.

Section 4 of the Act prescribes the process of registration of industry. According to it application is to be made for registration of Industry. Under Section 4(1) any person desirous of establishing any industry under the Act, an application is required to be made to the concern register office for its registration setting out the nature, documents, and particulars in a prescribed manner. Documents to be attached can be submitted with digital attestation through electronic means.

IEA 2076 prescribes the Registering Authority prescribing the Power to Provincial Government as well.

With federalism already being implemented, IEA 2076 has also adopted the principles and has de-centralized the registration process by granting authority to provincial levels for registration, renewal and regulation of all industries except for the following:

1. Industry listed in Schedule-1 of the IEA 2076,
2. Industry established with Foreign Investment,
3. Industry based on subject matter stated in schedule-5 of constitution of Nepal,
4. Industry having it's working area in two or more provinces,
5. Industry providing educational consultancy services in relation to diplomatic affairs.

However, the proviso provides that the Department of Industries ("DOI"), the federal authority, shall continue to be responsible for registration, renewal and regulation until the provincial governments make necessary arrangement through introduction of provincial laws.

IEA 2076 elucidates that industries based on atomic energy, manufacturing of radioactive materials, and Uranium related industry, shall be established and operated solely by the Government of Nepal.

For registration it has to fulfill all the requirements as similar to the registration of a company, by making an application either manually or online service with required documents and fees.

Pursuant to Section 4(6) the concern register office can ask the applicant for the submission of the incomplete particulars or documents as required by giving time up to ninety days.

Where, it is found that the applicant has failed to comply required formalities as required by the Act and Rules or failed to submit the required documents the concern registered office can refuse with reasons to register the industry under Section 4(7) of the Act. The notice regarding refusal of registration must be given within five days from the date of decision with reasons thereof.

Section 5 prescribes the provision relating to grant certificate of registration. According to it, on receipt of the application pursuant to Section 4 for the registration of industry the concern register office will, after making necessary examination regarding the compliance of required documents as per Act and regulation thereof, issue certificate registration as prescribed.

While issuing the certificate of registration in addition to others the concern is required to mention the following matters:

a. Date of issue of the certificate
b. Required date to be operated the production or the transaction
c. The terms and condition to be complied by the industry
d. Other terms and conditions as prescribed by the register office as per the nature of the industry

Notwithstanding anything mentioned in sub-section (1) in case of micro entreprise/industry the application for their registration can be made within one year from the date of its operation as per Section 5(3) of Act.

Section 6 prescribes the provision regarding the appeal against the refusal of the registration of industry. According to it, dissatisfied party, pursuant to section 4(7) of the refusal of the registration of the industry by the DOI, may make an appeal within thirty days from the receipt of issue of notice of refusal in the Ministry of Industry (MOI), and in case refusal by the provincial authority the appeal is to be made in MOI of the concern province.

Where appeal has been made, the concern appellant authority has to decide the matter after necessary examination against the appeal, within thirty days of the receipt of it. Other process of appeal will be as prescribed.

Question No. 4:

A family has intention to incorporate a company with an objective to produce petroleum and atomic energy. They have decided to take consultancy from you. Can they produce the energy as intended? Do they require approval and registration of the industry from the prescribed authority? Examine the given issues as per the provisions of the Industrial Enterprise Act, 2076.

(Dec, 2020) (7 marks)

Answer:

Legal Provision and validity of production of petroleum and atomic energy:

Section 8 (1) and Annex-1 of the Industrial Enterprises Act, 2076 have provided the petroleum products excavation industry could be established after taking approval from the Industry and Investment Promotion Board.

Similarly, Annex-3 has provided about the industries that produce energy from water, wind, solar power, coal, natural oil and fuel or gas, biomass or other resources and industries which manufactures machines/equipment that is used to produce such energy.

However, there is no any express provision about the atomic energy. It may be subject matter of interpretation from authorized institution. It could be inserted in the provision mentioned the word 'other resources'.

Sub-section 4 of Section 4 of this Act has imposed restriction to establish the atomic energy by any of the person(s) except by of the Nepal Government. It provides that notwithstanding anything contained in sub-section (1) and (2) of section 4, the industries that produce atomic energy, radioactive materials, industries concerning atomic energy and industries based on Uranium shall only be established and operated by Government of Nepal only. Therefore, the family can incorporate a company having its objectives of petroleum products excavation only but not to produce atomic energy.

Industries requiring prior approval before registration:

Annex-1 of the Industrial Enterprise Act, 2076 has been provided the list of the industries that requires approval before registration. The industries are as follows:

(1) Industries producing arms, ammunitions, gunpowder or explosives.
(2) Security printing, bank notes and coin industries,
(3) Cigarette, bidi, khaini, cigar, chewing tobacco and industries producing other goods of a similar nature utilizing tobacco as the basic raw material and industry producing electric cigarettes,
(4) Microbrewery, beer, Alcohol or substances beer producing industries, 5. Stone, ballast, sand excavation and processing industry,
(5) Industries producing radio communication equipment,
(6) Industries like mining of precious minerals and petroleum products excavation,
(7) Liquefied petroleum gas (L.P.G) refilling industries,
(8) All kinds of industries that produce drone products or provide services through drone,
(9) Other industries that need to take permission as prescribed by the prevalent laws.

In accordance with the provision as provided in Section 8(1) and of the above Act the annex-1 the petroleum products industries are also required to obtain approval from the Industry and Investment Promotion Board. However, company cannot be established and operated to produce atomic energy by the public except Government of Nepal.

Question No. 5:

Industrial Enterprises Act, 2073 has provision of the constitution of Industry and Investment Promotion Board. Discuss about the functions, duties and powers of the Board as prescribed under the Act.

(Dec, 2019) (7 marks)

Answer:

The functions, duties and powers of the Industry and Investment Promotion Board as prescribed in Section 21 of the Industrial Enterprise Act, 2076 are as follows:

a) to make recommendations to the Government of Nepal for the formulation of policies relating to industrial promotion, protection and promotion of investment and industrialization and adoption of relevant policy decisions;
b) to regularly appraise the policy, institutional, legal, institutional and procedural framework and modus operandi relating to the overall industrialization of the country and make recommendations to the Government for necessary reforms;
c) to make recommendations to the Government of Nepal for the adoption of necessary policy decisions on foreign investment and technology transfer, subject to the prevailing law;
d) to make recommendations to the Government of Nepal for the formulation of policies relating to industrial pollution control and adoption of relevant policy decisions;
e) to make comprehensive evaluation and appraisal of the situation of industrial development of the country and make suggestions and recommendations to the Government of Nepal for taking necessary steps;
f) to hear grievances of entrepreneurs and resolve, or cause to be resolved, the problems and make guidance to the concerned bodies in this respect;
g) to make recommendations to the Government of Nepal if it is required to make an alteration or change in the level, classification and nature of industries;
h) to carry out, or cause to be carried out, studies, research woks and surveys as required in the context of enhancing domestic and foreign investment in the industrial sector;
i) to do, or cause to be done, necessary work for building a competitive industrial environment, in effective coordination and harmonious collaboration with the public, private and cooperative sectors;
j) to give policy guidelines on matters requiring coordination between the Province and Local Levels for the development and expansion of industrial enterprises, and make necessary provision for coordination;
k) to facilitate the removal of the difficulty or confusion, if any, arising in the implementation of any law relating to industry;
l) to coordination or facilitate with respect to the operation of the one stop service centre;
m) to perform, or cause to be performed, other functions as prescribed.

Question No. 6:

The Industrial Enterprises Act, 2073 has provided various facilities to the industries established under this act. State the income tax facilities to the following group of industries:

i) Production oriented industry in general,
ii) Infrastructure industries,
iii) Industries established in areas as described in schedule -10,
iv) Exports by production oriented industries,
v) Industries who expend big amount for the long term benefit to workers and employees,
vi) Expenditure incurred on machinery and instruments to increase the productivity of energy.

[June, 2018](7 Marks)

Answer:

Chapter 5 of the Industrial Enterprises Act, 2076 has explained various facilities that are to be provided to the various types of industries established in Nepal. Section 24 of the act has specified the income tax exemption in the net profit of these industries as follows:

(i) The production oriented industries will get 20% rebate on the applicable income tax
(ii) Infrastructure industries like road, bridge, tunnel, train, tram, trolley bus, airport, industrial infrastructure will get rebate 40% on the applicable income tax;
(iii) All production industries except industries producing brandy, cider, and wine based on the fruits will get 90%, 80% & 70% rebate in applicable income tax for 10 years from the date of commencement of commercial production or transaction of such industry if these industries were established in least developed areas, developing and less developing areas as mentioned in the schedule -10 of the act.
(iv) The income from exports of production oriented industries will be eligible for a rebate of 25% on the applicable income tax;
(v) Expenses on long term benefits to workers will be fully allowed for deduction from its income for the purpose of income tax calculation;
(vi) Expenses incurred on machinery and instruments to increase the efficiency of energy production and economize the consumption of energy will be allowed for deduction from income for the purpose of income tax calculation.

Question No. 7:

Necha Salyan Hydro Electricity Company (P) Limited of Solu, Dungeswor Petrochemical Exploration Company of Dailekh and Lomangthan Resort (invested Rs. 50.1 million) at Mustang (all three are newly incorporated) applied to One Window Committee to get the facilities as mentioned in the various provisions of the Act. Explain referring the provisions of Industrial Enterprises Act, 2073

[December, 2017](6 Marks)

Answer:
Section 24 of Industrial Enterprises Act, 2076 has provided various facilities to different categories of industries. Here we will discuss three types of industries established in the different parts of the country as follow:

Necha Salyan Hydro Electricity Company (P) Limited
Necha Salyan Hydroelectricity Company is a newly established industry in Solu district. As per Industrial Enterprise Act, 2076, this company will be benefited hundred percentage income tax exemption for the first ten years of the production and fifty percent tax exemption for the next five years. However the industry should produce, distribute the electricity for commercial purpose within Chaitra 2080 BS.

Such exemption is entitled to Solar, Wind and Bio Mass energy as well. In case of industries that have already begun commercial production at the time of commencement of this Act, the exemptions applicable at the time of receiving approval would be applicable.

Dungeswor Petrochemical Exploration Company

Dungeshor Petrochemical Exploration Company was established in Dailekh to explore the petrochemical product in Nepal. This industry will be benefited as follows:

The company will be benefited 100% Income tax exemption for first 7 years from the date of commencement of transaction; 50% exemption on the income tax for next 3 years. However the industry should start their commercial production within Chaitra 2080 BS. The company will produce petroleum and natural gas or fuel exploration for further processing.

Lomangthan Resort

An industry related to tourism established with the investment of more than two billion rupees is entitled to hundred percent income tax exemption for first five years after the date of commencement of transaction and to fifty percent income tax exemption for next three years. Here in case of Lomanthan Resort investment is only Rs. 50.1 Million so this resort is not entitled to get tax exemption as per the provision of Industrial Enterprise Act, 2076.

Question No. 8:
Discuss the provisions regarding classification of industries on the basis of size of fixed asset and nature/sector of business as prescribed by the Industrial Enterprises Act, 2073 and its objectives
[December, 2018](7 Marks)

Answer:

Chapter-3 of the Industrial Enterprises Act, 2076 prescribes the provision regarding classification of industries.

The Act has given continuity to the general classification of industries on the basis of:

i. Size of fixed asset investment, and
ii. Nature of goods or services to be produced from such industries.

i. Classification of Industries on the basis of Fixed Assets:

Pursuant to section 17 of this Act, for the purpose of this Act Industries have been classified as follows:

a) Micro entrepreneur/Industries:

Following industries shall be considered as micro entrepreneur/industries:

- With fixed capital up to two million excluding House and hand,
- the entrepreneur himself or herself is involved in the operation and management of the industry
- Not exceeding nine employees including the entrepreneur,
- with annual transaction of less than ten million rupees and
- with the capacity of electric energy, fuel or other oil engine to be consumed by the engine, equipment or machine, if any, used being twenty KW or less.

However Industries requiring permission under section 8 shall not be considered as Micro Industries.

b) Cottage Industries:

Following industries will be considered as Cottage industries:

- based on traditional skills and technology;
- labour oriented and based on specific skills or local raw materials and local technology, arts and culture;
- with the capacity of electric energy to be consumed by the engine, equipment or machine, if any, used being up to fifty KW;
- any industry mentioned in Schedule-2

c) Small Industries: An industry with the fixed capital not exceeding one hundred fifty million rupees, other than a micro enterprise and cottage industry.

d) Medium Industries: An industry with the fixed capital exceeding one hundred fifty million rupees but not exceeding five hundred million rupees.

e) Large Industries: An industry with the fixed capital exceeding five hundred million rupees.

ii. The industries mentioned above are classified into the following on the basis of the nature of goods or services to be produced from such industries:

a) Energy based Industry: Industries mentioned in Schedule-3 engaged in the business of energy generation.

b) Manufacturing Industry*:* Industries manufacturing goods by using or processing raw materials, subsidiary raw materials or semi-processed raw materials.

c) Agriculture and forest product-based industry: Industries mentioned in Schedule-4 manufacturing any goods from agriculture or forest product based raw materials or related to agriculture or forest products;

d) Mining industry: Industries producing any metal or mineral substance other than metal by excavating or processing minerals;

e) Infrastructure industry: Industries mentioned in Schedule-5 building and operating physical infrastructures;

f) Tourism industry: Industries mentioned in Schedule-6 related to tourism services;

g) Information technology, communication technology and information dissemination technology-based industry: Industries mentioned in Schedule-7 providing services of information, communication or information dissemination technology by using technology for the collection, processing and dissemination of information;

h) Service industry: Industries mentioned in Schedule-8 producing or providing service

Question No. 9:

Mr. Dsouza, a Portuguese national, is working in Potential Mines Ltd., situated in Banepa, Nepal as a Mining Engineer. He has been hired by the company for a period of five years on the ground that he is a technician of the special category and such resources are not available in Nepal. The total remuneration paid to Mr. Dsouza is USD 20,000 per annum. Examine the validity of the following actions in the light of Industrial Enterprises Act, 1992:

i) Is the appointment of Mr. Dsouza valid assuming that the company is an industry under the Act?

ii) The Company is of the view that he should be retained for a longer period because of his expertise in the Mining Industry. How long can the Company retain him?

iii) What is the quantum of foreign exchange Mr. Dsouza can repatriate to his family back home?

[June, 2008](5 Marks) [June, 2012](5 Marks)

Answer:

i. Section 49 of Industrial Enterprises Act, 2076 prescribes about the appointment of human resources in industries as follows:

- Human resources required for the industry are to be fulfilled from Nepalese citizens only. However, if such human resource with any specific skill or competency required for an industry is not available from Nepali citizens in spite of the publication of an advertisement in a newspaper of national circulation or for a senior level management post, the industry may, on the recommendation of the Department, appoint a foreign citizen for a maximum of five years by obtaining labour permit under the prevailing labour law.

- If the foreign citizen so appointed happens to be a technician of a special category, not available in Nepal, such person may, with the approval of the Department of Labour, be appointed for up to an additional period of two years.

- If a foreign citizen is appointed to any industry, he or she may repatriate seventy percent of the remuneration received by him or her in foreign currency from Nepal.

From the above position, Mr. Dsouza's appointment is in accordance with the Act and thus legally valid.

ii. As per section 49(4) of the Act, since Mr. Dsouza happens to be a technician of special category and not available in Nepal, he can, with the approval of the Labour Department, be appointed for an additional two years period.

iii. As per the Section 49(5) of the Act, he can repatriate upto 70% of his total remuneration, which is up-to USD 14,000 annually.

Question No. 10:

Explain the process of seeking permission and obtaining registration for the establishment of a medium scale industry in Nepal.

[Final/June, 2012](5 Marks) [Final/June, 2010](5 Marks) [June, 2016](0.5+4.5=5 Marks) [June, 2013](5 Marks)

Answer:

i. Permission from Industry & Investment Promotion Board:
Section 8 of Industrial Enterprises Act, 2076 provides the following for seeking permission to establish an industry in Nepal:

1) Notwithstanding anything contained elsewhere in this Chapter, permission shall be obtained from the Board prior to registering any industry mentioned in Schedule-1. Provided that permission shall be obtained from the Government of Nepal, Council of Ministers, prior to registering any industry mentioned in serial number 1 of that Schedule.

2) A person who intends to register an industry requiring permission under subsection (1)shall make an application to the Board through the industry registration body in such a form and accompanied by such details as prescribed.

3) If, when examining the application and relevant documents under subsection (2), it appears that the required details or documents are attached, the industry registration body shall submit the matter, along with its opinion, to the Board for decision within seven days.

4) The Board shall decide to or not to give permission for the registration of industry with respect to the application received under subsection (2) within thirty days.

5) When deciding to give permission under subsection (4), the Board may also specify necessary additional terms and criteria.

6) If the Board decides to give permission under subsection (4), the Department shall provide a permit in the prescribed form, along with notice of the decision, to the concerned applicant within five days after the making of the decision.

7) A person who obtains permit under subsection (6) shall apply to the industry registration body for the registration of industry within the period mentioned in the permit. If no application is made within such specified period, such permit shall ipso facto become inoperative.
8) If the Board decides not to give permission for the registration of industry under subsection (4), the industry registration body shall give notice thereof to the applicant within five days after the making of the decision.
9) An applicant who obtains permit under subsection (6) shall not sell or dispose of the permit, transfer the right or change the ownership in it in any manner, prior to the commencement of operation, commercial production or transaction of the industry. Provided that if any applicant dies prior to the commencement of operation, commercial production or transaction of the industry, nothing shall prevent his or her heir under the prevailing law from performing the remaining acts in the capacity of applicant.

(ii) Registration of Industry:

Section 4 of the Act prescribes about the registration of industries as follows:

1) A person, firm or company that intends to establish any of the following industries under this Act shall make an application to the Department for registration in such a form and accompanied by such documents as prescribed:

- an industry mentioned in Schedule-1 that requires permission;
- an industry established with foreign investment;
- an industry related to any matter set forth in Schedule-5 of the Constitution of Nepal;
- an industry that falls under the jurisdiction of two or more Provinces;
- an industry related to academic consultancy services on diplomatic affairs.

2) The concerned Provincial Government shall carry out acts relating to the administration of industries including the registration, renewal and regulation of industries other than the industries under subsection (1). Provided that permission shall be obtained in the case of an industry requiring permission.

3) Notwithstanding anything contained in subsection (2), the Federation shall carry out acts relating to the administration of industries including the registration, renewal and regulation of the industries subject to registration, renewal and regulation by the Provincial Government until the concerned Provincial Government makes law on such industries.

4) Notwithstanding anything contained in subsections (1) and (2), industries generating atomic energy, radio-active materials, and industries related to atomic energy and uranium-based energy shall be established and operated by the Government of Nepal only.

5) The details or documents to be attached with an application to be made under subsection (1) may also be submitted through electronic means (online), and the relevant documents may be authenticated by a digital signature.

6) If, when examining an application received under subsection (1), it appears that any required details and documents are not submitted, the industry registration body shall immediately inform the applicant to submit such details or documents within a maximum period of ninety days.

7) If the applicant fails to submit the details or documents demanded under subsection (6) or it does not appear that the procedures under this Act or the rules framed under this Act are met, the industry registration body may, by setting out the reasons, reject the application for industry registration. If decision is made to reject, it shall give written information thereof, setting out the reasons, to the concerned applicant within five days after the decision.

8) A person, firm or company that intends to establish an industry other than an industry mentioned in subsection (1) shall make an application to the industry registration body of the concerned Province for registration of the industry, accompanied by such details and documents as provided in the Provincial law.

(iii) Certificate of Industry Registration to be issued:

Section 5 of the Act prescribes about the issuance of registration certificate as follows:

(1) If, when examining the application received under section 4, it appears that necessary details or documents are submitted, the industry registration body shall register the industry applied for by the applicant and give the industry registration certificate in the prescribed form within five days of the receipt of such details or documents.

(2) When giving the industry registration certificate under subsection (1), the following details, among other things, shall be set out in the certificate:

- the date of issue of the certificate;
- the period for the commencement of commercial production or transaction;
- the terms to be complied with by the industry;
- such other terms as specified by the industry registration body by making a decision, according to the nature.

(3) Notwithstanding anything contained in subsection (1), in the case of a micro-industry, application may be made to the industry registration body for the registration of industry within one year after the date of operation of that industry.

Question No. 11:

Section 18 of the Industrial Enterprises Act, 2049 has defines the types of fixed assets of industry. Write the name of these movable and immovable fixed assets as mentioned in the act.

[Final/December, 2012](5 Marks)

Answer:

Section 18(1) of Industrial Enterprises Act, 2076 prescribes about fixed assets as follows:

a. physical structure constructed or reformed on land, underground, space, water or below water;
b. physical structure constructed above land (e.g. sewage, internal road, drinking water related infrastructure, water supply system);
c. office, factory, building or ware house of the industry;
d. residence building constructed for employees or workers;
e. electric supply and related equipment and system;
f. machinery, equipment, tools and reserve spare parts thereof;
g. means of transportation;

h. office goods and equipment of capital nature;
i. fixture and furniture;
j. communication materials and related equipment and system

As per section 18(2), In addition to the assets set forth in subsection (1), the following expenses incurred prior to the establishment of an industry or at various stages of construction are also valuated as the fixed capital of the industry:

a) Technical and inspection expenses to be capitalized;
(b) pre-investment and preoperational expenses;
(c) interest expenses to be capitalized;
(d) environmental study and research expenses prior to the operation of the industry

Question No. 12:

Mr. Ghimire intends to set up a niche alcohol factory in Jumla, a remote area as per annex 3 to the Industrial Enterprises Act, due to availability of various wild fruits. Advise, whether permission would be necessary clearly stating the provisions regarding permission in the Industrial Enterprises Act, 2049 and its annexes.

[June, 2010](3 Marks) [December, 2015](5 Marks) [June, 2004](5 Marks)

Answer:

Niche alcohol factory comes under Schedule 1 of Industrial Enterprises Act, 2076. Hence, it requires permission from the Industry and Investment Promotion Board pursuant to section 8 of the Act.

Same type of question was asked in June, 2012 as well for 5 marks.

Schedule– 1 : Industries requiring permission

1. Industries producing arms, ammunition, gunpowder or explosives;
2. Security printing, bank notes and coin industries;
3. Industries producing cigarette, bidi, cigar, chewing tobacco and other goods utilizing tobacco as the basic raw materials, and electronic cigarettes;
4. Microbrewery, beer, alcohol, or alcoholic substances producing industries;
5. Stone, ballast, sand excavation, processing industries;
6. Industries producing radio communication equipment;
7. Industries like excavation of precious minerals and petroleum products;
8. Liquefied petroleum gas (L.P.G) refiling industries;
9. All kinds of industries producing drone products or providing services through drone;
10. Other industries requiring permission under the prevalent laws.

Question No. 13:

Chewang Lama wants to establish a pashmina industry at Bargaun. It is the industry which is mentioned in annex 1 and not required permission to establish as per the Industrial Enterprise Act. Though Mr. Chewang is still interested whether this pashima industry should be registered in the Department of Cottage and Small Industries under this Act?

[December, 2012](5 Marks)

Answer:

Section 4 of the Act prescribes about the registration of industries as follows:

1) A person, firm or company that intends to establish any of the following industries under this Act shall make an application to the Department for registration in such a form and accompanied by such documents as prescribed:

   - an industry mentioned in Schedule-1 that requires permission;
   - an industry established with foreign investment;
   - an industry related to any matter set forth in Schedule-5 of the Constitution of Nepal;
   - an industry that falls under the jurisdiction of two or more Provinces;
   - an industry related to academic consultancy services on diplomatic affairs.

2) The concerned Provincial Government shall carry out acts relating to the administration of industries including the registration, renewal and regulation of industries other than the industries under subsection (1). Provided that permission shall be obtained in the case of an industry requiring permission.

3) Notwithstanding anything contained in subsection (2), the Federation shall carry out acts relating to the administration of industries including the registration, renewal and regulation of the industries subject to registration, renewal and regulation by the Provincial Government until the concerned Provincial Government makes law on such industries.

4) Notwithstanding anything contained in subsections (1) and (2), industries generating atomic energy, radio-active materials, and industries related to atomic energy and uranium-based energy shall be established and operated by the Government of Nepal only.

5) The details or documents to be attached with an application to be made under subsection (1) may also be submitted through electronic means (online), and the relevant documents may be authenticated by a digital signature.

6) If, when examining an application received under subsection (1), it appears that any required details and documents are not submitted, the industry registration body shall

immediately inform the applicant to submit such details or documents within a maximum period of ninety days.

7) If the applicant fails to submit the details or documents demanded under subsection (6) or it does not appear that the procedures under this Act or the rules framed under this Act are met, the industry registration body may, by setting out the reasons, reject the application for industry registration. If decision is made to reject, it shall give written information thereof, setting out the reasons, to the concerned applicant within five days after the decision.

8) A person, firm or company that intends to establish an industry other than an industry mentioned in subsection (1) shall make an application to the industry registration body of the concerned Province for registration of the industry, accompanied by such details and documents as provided in the Provincial law.

Section 5 of the Act prescribes about the issuance of registration certificate as follows:

(1) If, when examining the application received under section 4, it appears that necessary details or documents are submitted, the industry registration body shall register the industry applied for by the applicant and give the industry registration certificate in the prescribed form within five days of the receipt of such details or documents.
(2) When giving the industry registration certificate under subsection (1), the following details, among other things, shall be set out in the certificate:
- the date of issue of the certificate;
- the period for the commencement of commercial production or transaction;
- the terms to be complied with by the industry;
- such other terms as specified by the industry registration body by making a decision, according to the nature.
(3) Notwithstanding anything contained in subsection (1), in the case of a micro-industry, application may be made to the industry registration body for the registration of industry within one year after the date of operation of that industry.

The registration of a Cottage and Small Industry shall be made in the Department of Cottage and Small Industries or any district level office under the Department or any office designated by the Department on its behalf and the registration of a medium and Large Industry shall be made in the Department of Industries or at such office as may be designated by the Department. Mr. Chewang has to get the industry be registered in the Department of Cottage and Small Scale Industries.

Question No. 14:

Industrial Promotion Board

[June, 2011](5 Marks) [June, 2010](5 Marks) [December, 2011](5 Marks)

Answer:

Industry and investment promotion board has been defined under section 2(j) of Industrial Enterprises Act, 2076 as the industry and investment promotion board constituted under Section 20.

Section 20 of Industrial Enterprises Act, 2076 prescribes about the constitution of Industry and Investment Promotion Board as follows:

1) An Industry and Investment Promotion Board as follows is hereby constituted:

- The Minister or State Minister for Ministry of Industries, Commerce and Supply - Chairperson
- Member (looking after industries), National Planning Commission -Member
- Governor, Nepal Rastra Bank -Member
- Secretary, (looking after matters related to industries) Ministry of Industries, Commerce and Supply -Member
- Secretary, Ministry of Finance -Member
- Secretary, Ministry of Labor, Employment & Social Security -Member
- Secretary, Ministry of Land Management, Cooperatives & Poverty Alleviation -Member
- Secretary, Ministry of Forest & Environment -Member
- Chief Executive Officer, Nepal Investment Board -Member
- Joint Secretary, Industrial & Investment Promotion Division, Ministry of Industries, Commerce and Supply -Member
- President, Federation of Nepal Chamber of Commerce & Industry -Member
- President, Confederation of Nepalese Industries -Member
- President, Federation of Nepal Cottage and Small Industries -Member
- President, Federation of Women Entrepreneurs -Member
- Two persons including at least one woman entrepreneur nominated by Ministry of Industries, Commerce and Supply from among experts in industrial sector -Member
- Director General, Department of Industries -Member Secretary

2) Notwithstanding anything contained in clause (a) of subsection (1), if both Minister and Minister of State for Industry, Commerce and Supplies are appointed, the Minister of State acts as a member of the Board.
3) If the Board so thinks necessary, it may invite an expert in the concerned field, any official or officer of the Government of Nepal or Provincial Government to attend the meeting of the Board.
4) The Board meets at least once in every two months and may meet any time as per necessity.

5) The member-secretary of the Board shall , in consultation with the chairperson of the Board, set the agenda to be deliberated at a meeting if the Board, and give notice thereof to every member in advance of at least twenty-four hours of the time for holding the meeting.
6) If any member of the Board has personal concern or interest in any item of the agenda to be presented for decision at the meeting of the Board, that member shall not participate in the decision-making process with respect to that item.
7) If it appears that a decision is made contrary to subsection (6), the decision becomes ipso facto void.
8) The member-secretary of the Board shall authenticate the decisions taken by the Board.
9) The secretariat of the Board is seated in the Department.
10) Other procedures relating to the meeting of the Board are as determined by the Board itself.

Question No. 15:

Generally there is no need of license for setting up an industry excepting specified industries. Accordingly an application for establishing an industry, not belonging to specified categories, was made on June 29, 2004 but up to the end of July 2004 no reply was received from the concerned authority. What is the remedy available to the applicant?

[June, 2005](5 Marks) [December, 2006](5 Marks)

Answer:

As per section 5 of the Industrial Enterprises Act 2076, the Industry Registration Body shall issue the industry registration certificate within 5 days of application received, if all particulars and procedures have been completed in compliance with this Act or Rules made under this Act.

However, in case of non-receipt or refusal of application, any dissatisfied party, pursuant to section 5 of the refusal of the registration of the industry by the Industry Registration Body may make an appeal to the Ministry, for a decision made by the Department, and to the Ministry of concerned Province responsible for industries, for a decision made by the industry registration body of the Province, within thirty days. Then, the ministry has to decide the matter after necessary examination against the appeal within thirty days of the receipt of it.

Question No. 16:

A Pvt. Ltd. Company wishes to set up a Cigarette making industry. The Company owns the following properties:

Land & Building	10
Machinery	10
Furniture/fixture	5
Stock of raw material	5
Account receivable	2
Preliminary expenses	2
	34 millions

Outline the steps for the registration of this company under the Industrial Enterprises Act, 1992.

[December, 2003](5 Marks)

Answer:

The total fixed assets of the company is 27 million rupees (excluding stock and account receivable). Hence, as per section 17 of Industrial Enterprises Act 2076, it shall be categorized as a small industry.

Since the company wishes to set up a cigarette making industry, it is required to obtain the approval of the department of industry (Schedule 1 & Section 8).

After obtaining approval under section 8 of the Act, the company should get registered under section 4 the Act, by putting up an application in the prescribed format to the industry registration body as prescribed by the rules.

Question No. 17:

Mention the functions, duties and powers of Industrial Promotion Board.

[June, 2009](5 Marks)

Answer:

As per Section 21 of the Industrial Enterprise Act, 2076, following are the functions duties and power of Board:

(1) In addition to its functions, duties and powers specified elsewhere in this Act, the functions, duties and powers of the Board are as follows:

a. to make recommendations to the Government of Nepal for the formulation of policies relating to industrial promotion, protection and promotion of investment and industrialization and adoption of relevant policy decisions;
b. to regularly appraise the policy, institutional, legal, institutional and procedural framework and modus operandi relating to the overall industrialization of the country and make recommendations to the Government for necessary reforms;
c. to make recommendations to the Government of Nepal for the adoption of necessary policy decisions on foreign investment and technology transfer, subject to the prevailing law;
d. to make recommendations to the Government of Nepal for the formulation of policies relating to industrial pollution control and adoption of relevant policy decisions;
e. to make comprehensive evaluation and appraisal of the situation of industrial development of the country and make suggestions and recommendations to the Government of Nepal for taking necessary steps;
f. to hear grievances of entrepreneurs and resolve, or cause to be resolved, the problems and make guidance to the concerned bodies in this respect;
g. to make recommendations to the Government of Nepal if it is required to make an alteration or change in the level, classification and nature of industries;

h. to carry out, or cause to be carried out, studies, research woks and surveys as required in the context of enhancing domestic and foreign investment in the industrial sector;
i. to do, or cause to be done, necessary work for building a competitive industrial environment, in effective coordination and harmonious collaboration with the public, private and cooperative sectors;
j. to give policy guidelines on matters requiring coordination between the Province and Local Levels for the development and expansion of industrial enterprises, and make necessary provision for coordination;
k. to facilitate the removal of the difficulty or confusion, if any, arising in the implementation of any law relating to industry;
l. to coordination or facilitate with respect to the operation of the one stop service centre;
m. to perform, or cause to be performed, other functions as prescribed.

(2) The Board may delegate any of its functions, duties and powers to a body or officer of the Government of Nepal.
(3) The Board shall submit an annual report on the functions performed by it to the Ministry within thirty days after the date of the end of a fiscal year. The Ministry shall publish such a report on its website.

Question No. 18:
Functions, duties and powers of the "One Window Committee"

[December, 2012](5 Marks)

Answer:
Government of Nepal shall, for the purpose of making available the exemptions, facilities and concessions provided by Industrial Enterprises Act, 2076 and prevailing laws to be enjoyed by any industry or investor constitute a Single Point Service Centre pursuant to section 37 of Industrial Enterprises Act, 2076.

Function, Duties and Power [u/s 38]:

(1) The functions, duties and powers of the One stop Service Centre are as follows:
a) to perform functions related to industry and business administration, including registration, permission or licensing, renewal, approval for transaction, enhancement of capacity of, and dissolution(except insolvency) of, any company, firm or industry under the prevailing law,
b) to perform functions related to approval of foreign investment under the prevailing law,
c) to perform functions related to labour permit and consent for work approval under the prevailing law,
d) to perform functions related to visa facility under the prevailing law;

e) to perform functions related to initial environmental examination and environmental impact assessment under the prevailing law;
f) to coordinate with concerned bodies with respect to provision of infrastructure services such as electricity, water, means of communication, land, roads required for industries and perform function related to focal point between other bodies;
g) to implement, or cause to be implemented, decisions made by the Government of Nepal on the provision of the incentives, exemptions, facilities or concessions to which industries and investors are entitled under the prevailing laws;
h) to perform functions related to approval of foreign currency exchange under the prevailing law;
i) to provide Permanent Accounts Number under the prevailing law;
j) to perform function on facilitating the obtaining of the export-import code and bonded warehouse to be provided by the Department of Customs and the Department of Commerce, Supplies and Consumer Interest Protection;
k) to perform such functions as delegated by the Board out of the functions, duties and powers conferred on it;
l) to receive applications on matters requiring institutional approval including on mines required for industries and make institutional coordination for the provision of approval;
m) to identify and receive all the documents required for the registration of industrial enterprises electronically, by developing and enforcing an electronic system that links all bodies within it;
n) to make necessary coordination and facilitation in the acquisition of law required for industries, assistance in the provision of land on lease, and make necessary coordination on the provision of land exceeding the ceiling;
o) to provide permission under the prevailing law for the goods requiring import permission or recommend for that purpose;
p) to establish and operate an investment portal and provide investment related notifications and information;
q) to perform functions related to recommendation and facilitation of every kind required for industrial enterprises;
r) to implement, or cause to be implemented, decisions or directions of the Ministry and Board;
s) to perform such other functions as may be specified by the Government of Nepal, by publishing a notice in the Nepal Gazette.

(2) The concerned body shall implement a decision made by the One stop Service Centre under this section.

(3) Provisions relating to the operation, management of the One stop Service Centre and the services, facilities and concessions to be provided by the Centre and procedures shall be as prescribed.

Question No. 19:

The Government can declare an industry "Sick Industry". What symptoms have been prescribed to become a sick industry as per the Industrial Enterprises Act, 2049? Can such industry get some special benefit/ relaxation for its revival or moderation as per the Industrial Enterprises Act, 2049?

[June, 2007](5 Marks) [December, 2008](5 Marks) [December, 2003](5 Marks)

Answer:

Identification of Sick industries (Section 39)

- If an industry which has been in operation for a minimum of five years after the date of commencement of its commercial production or transaction, and in a capacity that is thirty percent or less of its installed capacity for the last three consecutive years because of a circumstance beyond control but not because of its intentional default or managerial weakness is being operated in loss for the three consecutive years, the Government of Nepal may declare such an industry as a sick industry on the basis of such criteria and on the pursuance of such procedures as prescribed.

- If it appears from the scheme or project proposal submitted by an industry in a state of closure upon being sick under subsection (1) and study carried out by the Ministry that the industry may revive its operation if certain exemption, facility or concession is provided to it, the Government of Nepal may provide such exemption, facility or concession as prescribed for a certain period for the rehabilitation, reconstruction and management of such an industry.

- If a cooperative makes a proposal, with the consent of the investor, for the operation of any industry declared sick by the Government of Nepal under subsection (1), the industry may be caused to be operated through such a cooperative subject to the prescribed terms, having regard to, inter alia, the capacity of the cooperative, appropriateness and feasibility.

As per Section 41 of Industrial Enterprise Act, 2076, notwithstanding anything contained in the prevailing laws, the Government of Nepal may grant exemption in full or in part on duty, fee or tax on any machinery, tools, or equipment to be imported by an industry identified as a sick industry under Section 39 or classified under Section 40 for its expansion, re-structuring or diversification.

Question No. 20:

What do you understand by "Industries of National Priority" under the Industrial Enterprises Act?

[December, 2008](5 Marks)

Answer:

As per section 2(n) of Industrial Enterprises Act 2076, "National priority industry" means an industry under section 19.

Further, as per section 19 of the Act, the industries mentioned in Schedule-9 are considered to be industries of national priority which are as follows:

1. Cottage industries;
2. Energy-based industries;
3. Agriculture and forest product-based industries;
4. Infrastructure industries;
5. Export industries;
6. Adventurous tourism with infrastructures, rural tourism; ecological tourism, golf course, polo, pony trekking, trekking tourism, rafting, assembly, conference tourism, sports tourism, religious tourism, cultural tourism, fun park construction and operation, wildlife reserve;
7. Mine and mineral industries, petroleum and natural gas and fuel exploration and production;
8. Industries producing clinkers and cement using domestic limestones, pulps and paper, sugar, chemical fertilizer (except mixture), organic fertilizer, related to shoes, sandals, thread manufacturing, livestock farming, aquaculture, poultry farming, bee keeping, floriculture, preliminary processing of rubber based on local raw materials and manufacturing of rubber products, milk powder, drugs manufacturing, recycling of solid wastes and scraps, industries manufacturing fuel saving equipment, industries manufacturing instruments and equipment to be used by persons with disabilities, industries manufacturing agricultural machines, equipment and industrial machineries, industries manufacturing electrical motor vehicles, industries manufacturing medicines battling snakebite, industries manufacturing artificial eye lens;
9. Hospitals, nursing homes, veterinary hospitals and clinics, health check-up services, health laboratories, bio research centres and educational and training institutes established outside the Kathmandu valley, areas of Municipal Corporation, and areas of Sub-Municipal Corporations in the Terai area;
10. Information technology industries;
11. Industries established inside the industrial area, special economic zone and industrial village established and operated by the private sector;

12. Industries manufacturing such high price low weight/volume goods as specified by the Government of Nepal by publishing a notice in the Nepal Gazette after making required standards and identifying such goods;
13. Industries producing the goods or services determined by the Nepal Trade Integration Strategy approved by the Government of Nepal;
14. Production of motion pictur**es**

Question No. 21:

Dua-Dhulo Pvt. Ltd. has failed to install pollution control equipment in its factory even after the expiry of 6 months although the license prescribed a period of 3 months for the installation.

What actions can be taken against the Company? Is the Company entitled to appeal against the order?

[December, 2005](5 Marks)

Answer:

i. Actions taken against the company:

As per section 43(8) of Industrial Enterprises Act 2076, If an industry fails to comply with any terms to be complied with under this Act or the rules framed hereunder or any direction given by the Ministry upon recommendation of the industry registration body, from time to time, the industry registration body may impose the following fine on the industry:

a) a fine not exceeding five thousand rupees, if it is a micro-enterprise;
b) a fine of fifty thousand to one hundred fifty thousand rupees, if it is a cottage and small industry;
c) a fine of one hundred fifty thousand to three hundred thousand rupees, if it is a medium industry;
d) a fine of two hundred fifty thousand to three hundred thousand rupees, if it is a large industry

ii. Appeal against the action:

As per section 46(1) of the Act, if not satisfied with an order of punishment made under this Chapter, appeal may be made to the High Court within thirty-five days after the date of notice of the punishment.

Also as per Section 46(2), appeal may be made to the concerned District Court in the case of a decision made by the Local Level industry registration body and to the concerned High Court in the case of punishment imposed by the Provincial industry registration body or by the Department.

Hence, in the given case, if the company is dissatisfied at such action, it can appeal to the concerned high court within 35 days of notice received about such action.

Question No. 22:

Mr. Udhyamsheel established an industry without taking necessary permission as required under the provisions of the Industrial Enterprises Act, 2049. What actions the Government of Nepal may take against him? And what are the remedies available to him?

[December, 2013](5 Marks)

Answer:

i. Punishment:

As per Section 43(1) If any person operates an industry without registration under section 3, the industry registration body may require immediate closure of the industry and impose the following fine:

a. five thousand rupees, if it is a micro-industry;
b. twenty five thousand rupees, if it is a cottage and small industry;
c. fifty thousand rupees, if it is a medium industry;
d.one hundred thousand rupees, if it is a large industry.

ii. Remedies:

As per section 46(1) of the Act, if not satisfied with an order of punishment made under this Chapter, appeal may be made to the High Court within thirty-five days after the date of notice of the punishment.

Also as per Section 46(2), appeal may be made to the concerned District Court in the case of a decision made by the Local Level industry registration body and to the concerned High Court in the case of punishment imposed by the Provincial industry registration body or by the Department

Hence, in the given case, if Mr. Udhyamsheel is dissatisfied at such action, he can appeal to the concerned high court within 35 days of notice received about such action.

Question No. 23:

What types of funds the Government of Nepal may create pursuant to the existing Industrial Enterprises Act, 2073 for the industrial development of the country?

[June, 2019] (5 Marks)

Answer:

As per Industrial Enterprise Act, 2076, there are 2 fund one is Industry and investment promotion fund (Section 51) and another is Provincial industrial and investment promotion fund (Section 52). Below is the provision regarding these 2 funds.

Industry and investment promotion fund: (1) The Government of Nepal establishes an industry and investment promotion fund, for the promotion and protection of industrial investment in the country.

(2) The following amounts are credited to the fund under subsection (1):

(a) amount received from the Government of Nepal;
(b) amount received from any native person or organization;
(c) returns of investments from or amounts in the micro, cottage and small enterprise development fund, micro, cottage and small industry loan disbursement fund, technology development fund, female entrepreneurship development fund, venture capital fund, sick industry rehabilitation, restructuring and management fund and industrial investment protection and promotion fund existing at the time to commencement of this Act;
(d) amount of bilateral or multilateral grant or assistance received from any foreign government, international organization; Provided that prior to obtaining a grant or assistance from a foreign country, international organization, approval of the Government of Nepal, Ministry of Finance shall be obtained.
(3) The amount of the fund under subsection (1) may be spent in the following acts:
(a) development of micro-industries, cottage and small industries;
(b) development of technology;
(c) industrial promotion;
(d) rehabilitation, re-institutionalization and management of sick industries;
(e) development of women entrepreneurship.
(4) When spending the amount of the fund in the acts under subsection (3), investment and expenses shall be made subject to the approved annual programme of the fund.
(5) Other provisions relating to the operation and management of the fund shall be as prescribed.

Provincial industrial and investment promotion fund: (1) A Province may establish a Provincial industrial and investment promotion fund for promotion and protection of industrial investment in the Province.
(2) The fund to be established under subsection (1) shall be operated and managed under the Provincial law.
(3) The amount of the fund under subsection (1) may be spent in the acts mentioned in sub-section (3) of section 51.

CHAPTER-7

FOREIGN INVESTMENT AND TECHNOLOGY TRANSFER ACT, 2075

[Note: All answers suggested hereby have been updated as per FITTA, 2075]

Question No. 1:
Mr. John Vadureal, the US national, has invested in Hydropower business in Nepal. He sold the share he has owned to the Nepalese person. He has owned some profit from the business. He intended to repatriate the money as he obtained by the sale of shares and business profit. He consults you about the repatriation policy of Nepal. Provide the consultation about the repatriation provision as provided in the Foreign Investment and Technology Transfer Act, 2075 (FITTA). **(June 2022) (7 Marks)**

Answer:
Foreign Investment and Technology Transfer Act, 2075 (FITTA) has expressly provided the consent to do business in Nepal by foreign nationals. Section 20 has provided the repatriation of investment and earnings provision as follows:

1. A foreign investor may, if it so wishes, repatriate its investment from Nepal by selling wholly or partly of the shares or industry having its investment in accordance with the prevailing Nepal law, after paying all such taxes as may be leviable in accordance with the prevailing Nepal law.
2. A foreign investor may **repatriate the following amount** in the same foreign currency in which the investment has been made or other convertible foreign currency with the approval of the Nepal Rastra Bank, after paying the tax related liabilities under the prevailing law:

    a) Amount received from the sale of shares with foreign investment,
    b) Amount of profit or dividend received from foreign investment,
    c) In the case of liquidation or winding up of the industry or company, amount remaining after paying all liabilities following the liquidation or winding up,
    d) Amount of royalty received under the technology transfer agreement. Provided, however, that in the case of the royalty or fee for the use of a trademark under the transfer of technology in a liquor industry other that a liquor industry exporting cent percent of liquor, the amount of such royalty shall not exceed five percent of the total selling price, as prescribed, excluding the prevailing tax.
    e) Amount of lease rent under the lease investment,
    f) Amount received as damages or compensation, if any, received from the final settlement of a law suit, arbitration or any other legal process in Nepal,
    g) Amount that can be repatriated in accordance with the prevailing law.

3. In repatriating amount in a convertible foreign currency in accordance with sub-section (1) or (2), it shall be repatriated by making conversion at the prevailing exchange rate.
4. Where any foreign investor has lent a loan to any industry or company against the pledge or mortgage of a movable or immovable property situated in Nepal and the movable or

immovable property pledged or mortgaged required to be auctioned or forfeited because of non repayment of the principal or interest of such a loan, the institution lending such a loan may repatriate the principal and interest of the loan by auction of such property as if it were a bank or financial institution of Nepal.

5. In the case of termination of a lease agreement because of nonpayment in accordance with the lease agreement or breach of its terms, the foreign investor may repatriate its investment and the property invested in the lease.
6. A foreign investor who wishes to repatriate the foreign investment or amount earned therefrom in accordance with this Section shall make an application, in the form as prescribed, to the foreign investment approving body for approval to that effect. Provided, that such an application shall be made to the Single Stop Service Centre, if the Government of Nepal, by a notification in the Nepal Gazette grants to the Single Stop Service Centre, the power to the body to give approval relating to repatriation of foreign investment or amount earned therefrom.
7. If, in examining an application received pursuant to sub-section (6), it appears that the foreign investor has fulfilled the terms and liabilities referred to in this Act, prevailing law and the agreement made in relation to foreign investment, the foreign investment approving body shall give approval to repatriate the foreign investment or amount earned therefrom not later than fifteen days of the date of receipt of the application.
8. After obtaining the approval pursuant to sub-section (7), the foreign investor may make an application to the Nepal Rastra Bank for the foreign currency exchange facility.
9. The Nepal Rastra Bank shall, upon receipt of an application in accordance with sub-section (8), provide the exchange facility to the foreign investor for the repatriation of foreign investment.
10. Where the amount of investment is to repatriated by selling wholly or partly any industry with foreign investment or upon revocation of the registration of the industry or company for any reason, repatriation of the remaining amount may be made only after the payment or settlement of all liabilities including the tax payable by such an industry.
11. Notwithstanding anything contained elsewhere in this Section, a foreign investor may, in repatriating foreign investment made in any industry in accordance with this Act or profit earned therefrom, repatriate such investment or profit only to the extent of the ratio of the portion of its investment in the concerned company.
12. If any foreign investor is not satisfied with a decision made by the body giving such approval in the course of repatriation of the amount of its investment, the investor may make an application to the Ministry. The Ministry shall make a decision on such an application within thirty working days.

Question No. 2:

The Foreign Investment and Technology Transfer Act, 2075 has liberalized investment base by creating investment friendly environment to attract foreign capital and technology. Despite these efforts the turnout of FDI has not met the expectation. Answer the following questions by the concerned provisions of the Act. **(December 2021) (8 marks)**

i) Explain the objectives of the Act?

ii) Define the term "Foreign Investor" and "Foreign Investment" under the Act.

iii) Explain the procedure how a prospective Investor of China could obtain foreign investment approval in Nepal.

iv) Is there any maximum ceiling threshold of foreign investment prescribed in the foreign investment approval?

Answer:

i) The objectives of the Foreign Investment and Technology Transfer Act (FITTA), 2075 has been explained in its Preamble. It explains that this Act has been brought into effect to amend and consolidate the prevailing Nepal laws relating to foreign investment and technology transfer in order to make national economy competitive, strong and employment-oriented through mobilization to the maximum extent of the available means and resources for economic prosperity of the country, and to achieve sustainable economic growth through industrialization while creating investment friendly environment to attract foreign capital, technology and investment in the sectors of import substitution, export promotion, through increase in productivity, and of infrastructure development and production of goods or services.

ii) Pursuant to section 2(k) of this Act, "Foreign Investor" means any foreign individual, firm, company, non-resident Nepali or foreign government or international agency or other corporate body of similar nature that makes foreign investment, and also includes, in the case of a foreign investor that is an institutional foreign investor, the ultimate beneficiary of such an institution.

Pursuant to section 2(j) of this Act, "Foreign investment" means the following investment made by a foreign investor in an industry or company:

(1) Share investment in foreign currency,

(2) Re-investment in an industry of dividends derived from foreign currency or shares,

(3) Lease finance made in accordance with Section 6 of this Act,

(4) Investment made in venture capital fund in accordance with Section 9 of this Act,

(5) Investment made in listed securities through secondary securities market in accordance with Section 10 of this Act,

(6) Investment made by purchasing shares or assets of a company incorporated in Nepal,

(7) Investment received through the banking channel after issuing securities in a foreign capital market by an industry or company incorporated in Nepal in accordance with Section 11 of this Act,

(8) Investment made through technology transfer, or

(9) Investment maintained by establishing and expanding an industry in Nepal.

iii) Section 15 of this Act provides application to be made for approval to make foreign investment by a foreign investor (including a Chinese Investor) as under:

(1) A foreign investor wishing to make foreign investment shall have to make an application, setting out the details, accompanied by a time schedule for bringing foreign investment into Nepal and action plan on investment in the industry, to the Foreign Investment Approving Body for approval, to make foreign investment, in such a form and setting out such details as prescribed.

(2) If, in examining an application received pursuant to sub-section (1) above, it appears that such documents as prescribed have been completed, the Foreign Investment Approving Body shall give approval for foreign investment in such a form as prescribed within period of seven days of the date of receipt of the application subject to section 17 of this Act.

(3) An industry which ha9s obtained approval pursuant to sub-section (2) wishes to make investment from the eared profits in the same industry or in any industry other than that referred to the Schedule of this Act, it is not necessary for it to re-obtain approval on foreign investment.

Provided that the matter requiring license or permission under the prevailing law for the purpose of registration of an industry or company or tax or any other business, or any requirements afterwards of approval shall be governed accordingly.

For the purpose of section 17 of this Act, Foreign Investment Approving Body is identified as:

(1) The Department of Industries which shall approve the foreign investment not exceeding six billion Rupees.

(2) The Investment Board under the Investment Board Act, 2068 which shall approve the foreign investment exceeding six billion Rupees.

iv) Pursuant to section 13 of this Act, no maximum ceiling of the amount to be invested and the share of investment by a foreign investor wishing to make investment in Nepal shall be prescribed.

However, in the case of service industry, the maximum ceiling of equity foreign investment and ceiling of investment to be made in securities pursuant to Section 10 of this Act, may be so prescribed as not to be lesser than the commitment made by Nepal in respect of the concerned sector or sub-sector at the time of obtaining membership of the World Trade Organisation.

Question No. 3:

How a dispute between foreign investor and Nepali investor can be settled under the Foreign Investment and Technology Transfer Act, 2075?

(June, 2021) (6 marks)

Answer:

Section 40 of the foreign investment and technology transfer Act, 2075 mentions about the process of settlement of disputes between foreign investor and Nepali investor, which is as follows:

(1) If there arises any dispute between a Nepali investor and a foreign investor in relation to foreign investment, the Department may make it necessary facilitation in order that such a dispute is settled by the concerned parties through mutual discussions or negotiations.

(2) If the dispute cannot be settled through the process referred to in sub-section (1) within a period of forty-five days after the dispute has arisen, and a joint investment or dispute settlement agreement exists between the parties to the dispute for the resolution of such a dispute, the dispute shall be settled in accordance with such an agreement.

(3) The parties shall give information about the settlement of the dispute in accordance with sub-section (2) to the Foreign Investment Approving body not later than fifteen days of its settlement. Provided, that the parties shall not be bound to give information about on what terms and conditions such a settlement has been made.

(4) If the agreement concluded between the parties in accordance with sub-section (2) has no provision about the settlement of disputes, such a dispute shall be settled by arbitration in accordance with the arbitration law of Nepal.

(5) Any dispute arising in connection with any foreign investment shall be settled by arbitration in accordance with the prevailing Rules or Procedures of the United Nations Commission on International Trade Law (UNCITRAL), unless otherwise agreed upon by the parties to the dispute.

(6) Arbitration to be conducted in accordance with this Section shall be held in Nepal, and substantive law of Nepal relating to arbitration shall apply. Provided, that with respect to

the case referred to in sub- section (2), the provision contained in that sub-section shall apply.

(7) If no agreement was made between the parties on the settlement of dispute prior to the arising of the dispute or if they realize that the agreement, if any made, is inadequate, the concerned parties may make an agreement for the settlement of a dispute even after the dispute has arisen. Information of the agreement so made shall be given to body registering the industry.

(8) Any dispute with respect to the agreement made in accordance with sub-section (7) may also be settled in accordance with this Section.

Question No. 4:

Who is a foreign investor? What facilities and concessions are granted to the foreign investors under the Foreign Investment and Technology Transfer Act, 2049? Answer.

[Final/December, 2011](5 Marks)[Final/June, 2012](5 Marks)[June, 2016](5 Marks) [Final/June, 2010](5 Marks) [December, 2018](5 Marks) [December, 2015](5 Marks)[June, 2019](7 Marks)

Answer:

i. Foreign Investor:

As per section 2(k) of Foreign Investment and Technology Transfer Act 2075, foreign investor includes any foreign individual, firm, company, Non Resident Nepali (NRN) or foreign government or international institutions or similar organized institutions and the term also includes, in case of institutional foreign investors, the ultimate beneficial owner of such institution.

ii. Facilities and Concessions:

Bank account facilities:

As per section 25 of the Act, foreign investor can open and operate Nepalese currency bank account in any bank or infrastructure development bank or financial institution and also open & operate foreign currency bank account in any bank of financial institution licensed to transact convertible foreign currency as per prevailing law. Provided that approval of Nepal Rastra Bank shall be obtained to open and operate bank account in convertible foreign currency.

Visa facilities:

Section 30 of the Act prescribes about visa facilities as follows:

1) A foreign national visiting Nepal for conducting study, research or survey for investment in Nepal shall be granted non-tourist visa up to 6 months.

2) A foreign investor or his authorized representative and dependent family of such investor or authorized representative shall be granted business visa until the minimum amount of foreign investment as prescribed is retained.
   Explanation: For the purpose of this section, "family members" means husband or wife, mother father and minor con daughter of foreign investor or his authorized representative.
   Notwithstanding anything contained in sub-section (2), in case of investor investing more than the prescribed amount such facility shall be granted for up to two persons and his family member only.
3) Foreign investor who, at a time, makes an investment in excess of US$ 1 million or equivalent in convertible foreign currency, residential visa shall be granted to the investor or his authorized representative and their dependent family until minimum foreign investment as prescribed is retained.
4) Foreign specialist, technician or managerial staff expatriated in industry as per section 27 shall be granted with non-tourist visa.

Repatriation Facility:

Section 20 of the Act prescribes about the repatriation facility as follows:

Foreign investors, if desire, may sell shares or industry fully or partially of his investment as per prevailing law and repatriate his investment after paying all the taxes as per prevailing laws.

Foreign investor can repatriate the amount in the same currency of investment or in other convertible foreign currency with approval of NRB.

Foreign investor can repatriate following amounts in the same currency of investment or in other convertible foreign currency with approval of NRB after fulfilling liabilities prescribed under prevailing laws:

a) The amount received by the sale of the share of foreign investment
b) The amount received as profit or dividend in lieu of the foreign investment.
c) In case of cancellation or liquidation of industry or company, proceeds remained of cancellation or liquidation after fulfilling entire liabilities
d) Royalty amount received under technology transfer agreement.
   Provided that in case of royalty or fee for using trademark except the beverage industry exporting hundred percent beverage other beverage industry excluding the gain tax as per prevailing law shall not be more than 5% of gross sale as prescribed.
e) Lease rent obtained under lease agreement
f) Any fine or compensation recovered from case, arbitration or any other legal proceedings in Nepal
g) Amount that may be repatriated as per prevailing law

Question No. 5:

A Nepalese company with its Malaysian joint venture partner has established a separate company in Nepal. In the course of business of the joint venture company, a dispute arose between the Malaysian and Nepalese investors and they sought your legal advise on it. Suggest them the appropriate course of dispute resolution under the Foreign Investment and Technology Transfer Act, 2049.

[December, 2018](6 Marks) [December, 2016](5 Marks)[December, 2003](5 Marks)

Answer:

Section 40 of Foreign Investment & Technology Transfer Act, 2075 prescribes about settlement of dispute as follows:

1) In case any dispute arises regarding foreign investment between Nepali investor and foreign investor, Department of Industry may facilitate to settle the dispute through mutual discussion or negotiation.
2) If the dispute fails to settle by the procedure prescribed under sub-section (1) within 45 days of dispute arise and an agreement concluded between parties of the dispute relating to joint investment or dispute settlement for the settlement of dispute, dispute shall be settled as per such agreement.
3) Parties shall provide information about the dispute settled under sub-section (2) to the entity permitting foreign investment within 15 days of dispute settlement.
   However, parties shall not be bound to provide the information regarding under what which condition such consent has been made.
4) If the agreement concluded between parties under sub-section (2) does not mention any provision regarding the settlement of dispute, it shall be settled by arbitration in accordance with the prevailing law of Nepal.
5) Unless otherwise agreed by disputing parties relating to the dispute arise in foreign investment, arbitration shall be done in compliance with Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).
6) The arbitration shall be held in Nepal and substantive law of Nepal shall be applicable in the arbitration.
   Provided that in condition of sub-section (2), same sub-section shall be applicable.
7) If parties have not concluded any agreement for dispute settlement before the arousal of dispute or the concluded agreement is inadequate, even after the arousal of dispute, concerned parties may conclude agreement. Information regarding agreement concluded in such a way shall be provided to the Industry Registration Entity.
8) Even for agreement concluded under sub-section (7), this section may be applied for the settlement of dispute.

Question No. 6:

Under the Foreign Investment and Technology Transfer Act (FITTA), 2049 what types of business are restricted to be established under foreign investment? How far the foreign investors are allowed to repatriate their earnings to their home country(ies)? Explain.

[June, 2017](10 Marks)

Answer:

a) Restricted business:

Following are the restricted business for foreign investment as prescribed under the Annex of Foreign Investment and Technology Transfer Act (FITTA), 2073:

1. Animal husbandry, Fishery business, Beekeeping, fruits, vegetables, oil seeds, pulse seeds, milk industry and priority production in agricultural sector
2. Cottage and Small industry
3. Personal Service Business (Business such as Hair Cutting, Tailoring, Driving etc.)
4. Industry producing arms and ammunitions, bullets and shell, gunpowder or explosive materials, nuclear, biological and chemical (N.B.C.) weapon, atomic energy, radio-active materials
5. Real estate business (Excluding Construction Industries), Retail business, Internal Courier Service, Local Catering Service, Moneychanger, Remittance service
6. Travel Agency involved in tourism, path guide, trekking and mountaineering path guide, rural tourism including homestay
7. Business of mass communication media (newspaper, radio, television and online news) and motion picture of national language;
8. Management, account, engineering, legal consultancy service and language training, music training, computer training; and
9. Consultancy service having foreign investment of more than 51 percent

Further pursuant to section 9 A of this Act, the Government of Nepal may, by notification in Nepal Gazette, make necessary alterations or amendments in Part (B) of the Annex.

b) Repatriation facilities:

Section 20 of the Act prescribes about the repatriation facility as follows:

Foreign investors, if desire, may sell shares or industry fully or partially of his investment as per prevailing law and repatriate his investment after paying all the taxes as per prevailing laws.

Foreign investor can repatriate the amount in the same currency of investment or in other convertible foreign currency with approval of NRB.

Foreign investor can repatriate following amounts in the same currency of investment or in other convertible foreign currency with approval of NRB after fulfilling liabilities prescribed under prevailing laws:

a) The amount received by the sale of the share of foreign investment
b) The amount received as profit or dividend in lieu of the foreign investment.

c) In case of cancellation or liquidation of industry or company, proceeds remained of cancellation or liquidation after fulfilling entire liabilities
d) Royalty amount received under technology transfer agreement.
Provided that in case of royalty or fee for using trademark except the beverage industry exporting hundred percent beverage other beverage industry excluding the gain tax as per prevailing law shall not be more than 5% of gross sale as prescribed.
e) Lease rent obtained under lease agreement
f) Any fine or compensation recovered from case, arbitration or any other legal proceedings in Nepal
g) Amount that may be repatriated as per prevailing law.

Question No. 7:
What is transfer of technology? Explain the legal provisions as to the transfer of foreign technology in Nepal.

[December, 2014](5 Marks)

Answer:

a) Technology Transfer

As per Sec. 2(f) of Foreign Investment and Technology Transfer Act 2073, Technology Transfer shall denote any transfer of technology to be made under an agreement between an industry and a foreign investor on the following matters:

i. Patent, design, trademark, goodwill, technical specialization, formula or process
ii. Users license, Know how sharing or franchise
iii. Foreign technical advisor, management and marketing service or other technical skill or knowledge

b) Provision for Transfer of Technology:

FITTA, 2073 has included foreign technology transfer also as a part of foreign investment. Hence, in order to make any foreign technology transfer, the foreign investor has to obtain prior approval from the department of industry and other concerned authorities under chapter 3 of the Act as follows:

a) As per section 15(1) of the Act, any foreign investor desirous to invest in Nepal has to apply to the foreign investment approving authorities in the prescribed format along with time schedule for expatriating foreign investment in Nepal and action plan of investment in industry along with other particulars.
b) As per section 17 of the Act, the foreign investment and technology transfer should be approved by the foreign investment approving authority. It provides two different following authorities:
   i. Department of Industry as approving authority for foreign investments of up to NRs 6 billion.

ii. Investment Board of Nepal as approving authority for foreign investments above NRs 6 billion.

c) Section 15(2) of the FITTA specifies that the approval will be provided within 7 days once complete application documents are submitted.

d) Section 16(1) of the FITTA provides that only notification to the NRB after obtaining the first approval from DOI will suffice to bringing funds, but sub-section (2) provides that procedures set out by NRB needs to be fulfilled.

e) Industries registered under the authority of different provinces of Nepal will require recommendation from Ministry of Industry of such state to approve foreign investment.

Question No. 8:

How is dispute settled, if it arises between a foreign investor and a national investor under the Foreign Investment and Technology Transfer Act, 2049? Also discuss the other particular law(s) if applicable in this case

[June, 2013](5 Marks)

Answer:

First Part of Answer:

[December, 2016](6 Marks)

Second Part of Answer:

Section 40 of Foreign Investment & Technology Transfer Act, 2075 prescribes about settlement of dispute as follows:

1) In case any dispute arises regarding foreign investment between Nepali investor and foreign investor, Department of Industry may facilitate to settle the dispute through mutual discussion or negotiation.
2) If the dispute fails to settle by the procedure prescribed under sub-section (1) within 45 days of dispute arise and an agreement concluded between parties of the dispute relating to joint investment or dispute settlement for the settlement of dispute, dispute shall be settled as per such agreement.
3) Parties shall provide information about the dispute settled under sub-section (2) to the entity permitting foreign investment within 15 days of dispute settlement.
   However, parties shall not be bound to provide the information regarding under what which condition such consent has been made.
4) If the agreement concluded between parties under sub-section (2) does not mention any provision regarding the settlement of dispute, it shall be settled by arbitration in accordance with the prevailing law of Nepal.

5) Unless otherwise agreed by disputing parties relating to the dispute arise in foreign investment, arbitration shall be done in compliance with Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).
6) The arbitration shall be held in Nepal and substantive law of Nepal shall be applicable in the arbitration.
   Provided that in condition of sub-section (2), same sub-section shall be applicable.
7) If parties have not concluded any agreement for dispute settlement before the arousal of dispute or the concluded agreement is inadequate, even after the arousal of dispute, concerned parties may conclude agreement. Information regarding agreement concluded in such a way shall be provided to the Industry Registration Entity.
8) Even for agreement concluded under sub-section (7), this section may be applied for the settlement of dispute.

Nevertheless, the Industrial Enterprises Act, the taxation laws, labour law, Contract Act, Arbitration Act, Trade law and other laws to the extent of relevancy also will be applied in this case.

Question No. 9:

Answer the following questions:

John Lenon, an Australian citizen, interested to establish a cement factory in Jumla and currently in the visit of Jumla with his feasibility survey team, wants to clear the following queries before injecting foreign capital to Nepal. You as a consultant suggest him referring the provisions of concerned acts of Nepal.

a) Meaning of foreign investments and foreign investors in Nepal;
b) Types of visas to the foreign investors and their families;
c) Repatriation of earning to John Lenon's country;
d) Registration of foreign company under Companies Act, 2063.

[Final/December, 2012](4+3+3+10=20 Marks)

Answer:

b) (i) Foreign Investment:

As per Section 2(j) of the Foreign Investment and Technology Transfer Act, 2073, foreign investment means the following investment made by a foreign investor in industry or company:

2) Share investment in foreign currency
3) Re-investment of dividend obtained from foreign currency or share in industry
4) Lease investment(lease finance) as per section 6
5) Investment in venture capital fund as per section 9
6) Investment in listed securities through secondary market of securities
7) Investment made by acquiring shares or assets of a company incorporated in Nepal

8) Investment received through banking system after issuing securities in foreign capital market by an industry or company established in Nepal
9) Investment made through technology transfer
10) Investment maintained by establishing and expanding an industry in Nepal.

(ii) Foreign Investor:

As per section 2(k) of Foreign Investment and Technology Transfer Act 2075, foreign investor includes any foreign individual, firm, company, Non Resident Nepali (NRN) or foreign government or international institutions or similar organized institutions and the term also includes, in case of institutional foreign investors, the ultimate beneficial owner of such institution.

c) Section 30 of the Act prescribes about visa facilities as follows:

1) A foreign national visiting Nepal for conducting study, research or survey for investment in Nepal shall be granted non-tourist visa up to 6 months.
2) A foreign investor or his authorized representative and dependent family of such investor or authorized representative shall be granted business visa until the minimum amount of foreign investment as prescribed is retained.
   Explanation: For the purpose of this section, "family members" means husband or wife, mother father and minor con daughter of foreign investor or his authorized representative.
   Notwithstanding anything contained in sub-section (2), in case of investor investing more than the prescribed amount such facility shall be granted for up to two persons and his family member only.
3) Foreign investor who, at a time, makes an investment in excess of US$ 1 million or equivalent in convertible foreign currency, residential visa shall be granted to the investor or his authorized representative and their dependent family until minimum foreign investment as prescribed is retained.
4) Foreign specialist, technician or managerial staff expatriated in industry as per section 27 shall be granted with non-tourist visa.

d) Section 20 of the Act prescribes about the repatriation facility as follows:

Foreign investors, if desire, may sell shares or industry fully or partially of his investment as per prevailing law and repatriate his investment after paying all the taxes as per prevailing laws.
Foreign investor can repatriate the amount in the same currency of investment or in other convertible foreign currency with approval of NRB.
Foreign investor can repatriate following amounts in the same currency of investment or in other convertible foreign currency with approval of NRB after fulfilling liabilities prescribed under prevailing laws:

a) The amount received by the sale of the share of foreign investment
b) The amount received as profit or dividend in lieu of the foreign investment.

c) In case of cancellation or liquidation of industry or company, proceeds remained of cancellation or liquidation after fulfilling entire liabilities
d) Royalty amount received under technology transfer agreement.
Provided that in case of royalty or fee for using trademark except the beverage industry exporting hundred percent beverage other beverage industry excluding the gain tax as per prevailing law shall not be more than 5% of gross sale as prescribed.
e) Lease rent obtained under lease agreement
f) Any fine or compensation recovered from case, arbitration or any other legal proceedings in Nepal
g) Amount that may be repatriated as per prevailing law

Hence, right now John is not a foreign investor.

e) Section 154 of the company Act, 2063 has defined the registration of foreign company as follows:

9) No foreign company shall carry on any business or transaction in the Nepal without having a branch office of such company registered with the office of such company registered with the office pursuant to this Section or establishes such office without having a liaison office registered. Provided, however, that making investment in shares in any company established pursuant to law, lending moneys to such company or participating in the operation or management of such company, with the approval of the competent body, shall not be deemed to be the carrying on of a business or transaction for the purposes of this Chapter .
10) A foreign company desiring to have its branch office registered pursuant to Sub-section (1) shall make to the Office an application, accompanied by the permission obtained from the concerned body pursuant to the prevailing law, and the prescribed fees and in such format as prescribed, for the registration of such company.
11) A foreign company desiring to have its liaison office registered pursuant to Sub-section (1) shall make to the Office an application, accompanied by the permission, if any, required to be obtained from the concerned body pursuant to the prevailing law for the registration of such office, and the prescribed fees and in such format as prescribed, for the registration of such company.
Explanation: Where any foreign company is selected by any competent body pursuant to the prevailing law or enters into contract with any competent body, for any business in Nepal, the making of such selection entering into such contract shall, for the purposes of Subsections (1) and (2) , be deemed to be the permission given by the concerned body.
12) On receipt of an application made for the registration of a foreign company pursuant to Sub-section (2) or (3), the Office shall make necessary inquiry, register such company and give the registration certificate, as prescribed, no later than thirty days after the making of the application for carrying on a business or transaction in or establishing a liaison office in the Nepal.

13) Where a foreign company cannot be registered pursuant to an application made under Sub-section (2) or (3), the Office shall give information thereof, setting out the reasons for the same, to the concerned applicant within thirty days.
14) A foreign company registered pursuant to Sub-section (4) may open its branch office and carry on the concerned business or transaction in or open its liaison office in the Nepal. Provided, however, that a foreign company registered as a liaison office shall not be entitled to do any income earning activity in Nepal.
15) Where the name of a foreign company making application pursuant to Sub-section (2) or (3) or the objective to be implemented by such company is of such a nature that it cannot be registered pursuant to this Act, such foreign company shall not be registered in Nepal.
16) A foreign company registered pursuant to Sub-section (4) shall be deemed to have been registered to carry on only the same type of business or transaction as is being carried on by it in the country where its registered office is situated or it has been incorporated.
17) A foreign company registered pursuant to this Section shall put its name board in the place of its business in a manner conspicuous to all,, and the name of country where the company has been established and the registration number of the company registered in Nepal shall be clearly mentioned in such board and bills, receipts, invoices, etc or letter head to be used by the company.
18) The office shall maintain a separate register for the registration of foreign companies registered pursuant to this Section and make arrangements for the inspection of such register by the general public and for getting a copy thereof by paying the prescribed fees.
19) Notwithstanding anything contained elsewhere in this Act, a foreign company registered pursuant to this Section shall not issue shares or debentures within the Nepal.
20) Notwithstanding anything contained elsewhere in this Act, a foreign company which is carrying on a business or transaction or which has established its liaison office in the Nepal without having been registered at the time of commencement of this Act shall get it registered with the Office pursuant to this Act no later than six months after the date of commencement of this Act.

Question No. 10:

Mr. David, an American, paid US$ 1 million to a airlines operated in Nepal as a token money to purchase 80% of share of that company after getting approval from the department of Industry as a foreign investment under Foreign Investment and technology Transfer Act, 1992. However, no shares of the company had transferred to Mr. David nor any foreign currency was invested later.

Is the above amount deemed as foreign investment under the Foreign Investment and Technology Transfer Act? If not, what are the legal procedures to make the above transaction to be valid as foreign investment?

[December, 2009](5 Marks)

Answer:

The above investment is not deemed as foreign investment as Mr. David has paid token money with the condition that later on he will obtain approval from department of industry and then transfer 80% of share of that company. He had not obtained approval from the Department of Industry before paying the token money to invest in the said airlines under Chapter 3 of the Foreign Investment and Technology Transfer Act, 2073. Hence, it is not a foreign investment pursuant to the Act.

As per clause (j) of Section 2 of the Foreign Investment and Technology Transfer Act, 2073, foreign investment means the following investment made by a foreign investor in industry or company:

1) Share investment in foreign currency
2) Re-investment of dividend obtained from foreign currency or share in industry
3) Lease investment(lease finance) as per section 6
4) Investment in venture capital fund as per section 9
5) Investment in listed securities through secondary market of securities
6) Investment made by acquiring shares or assets of a company incorporated in Nepal
7) Investment received through banking system after issuing securities in foreign capital market by an industry or company established in Nepal
8) Investment made through technology transfer
9) Investment maintained by establishing and expanding an industry in Nepal.

In order to make any investment a valid foreign investment, investment should be made in afore stated sector prescribed by section 2(j) of the Act and before making such investment, the foreign investor has to obtain approval from the department of industry and other concerned authorities under chapter 3 of the Act as follows:

a) As per section 15(1) of the Act, any foreign investor desirous to invest in Nepal has to apply to the foreign investment approving authorities in the prescribed format along with time schedule for expatriating foreign investment in Nepal and action plan of investment in industry along with other particulars.
b) As per section 17 of the Act, the foreign investment and technology transfer should be approved by the foreign investment approving authority. It provides two different following authorities:
    iv. Department of Industry as approving authority for foreign investments of up to NRs 6 billion.
    v. Investment Board of Nepal as approving authority for foreign investments above NRs 6 billion.
c) Section 15(2) of the FITTA specifies that the approval will be provided within 7 days once complete application documents are submitted.
d) Section 16(1) of the FITTA provides that only notification to the NRB after obtaining the first approval from DOI will suffice to bringing funds, but sub-section (2) provides that procedures set out by NRB needs to be fulfilled.

e) Industries registered under the authority of different provinces of Nepal will require recommendation from Ministry of Industry of such state to approve foreign investment.

Question No. 11:

Write short note on Technology Transfer

[December, 2008](5 Marks)

Answer:

As per Sec. 2(f) of Foreign Investment and Technology Transfer Act 2073, Technology Transfer shall denote any transfer of technology to be made under an agreement between an industry and a foreign investor on the following matters:

iv. Patent, design, trademark, goodwill, technical specialization, formula or process
v. Users license, Know how sharing or franchise
vi. Foreign technical advisor, management and marketing service or other technical skill or knowledge

Question No. 12:

International Finance Corporation has granted a loan to a hydroelectricity project Company in Nepal. Does the loan qualify as foreign investment? What is the process prescribed in the Foreign Investment and Technology Transfer Act, 1992 for making/availing foreign investment in Nepal?

[June, 2008](5 Marks)

Answer:

As per Section 2(j) of the Foreign Investment and Technology Transfer Act, 2073, foreign investment means the following investment made by a foreign investor in industry or company:

1) Share investment in foreign currency
2) Re-investment of dividend obtained from foreign currency or share in industry
3) Lease investment(lease finance) as per section 6
4) Investment in venture capital fund as per section 9
5) Investment in listed securities through secondary market of securities
6) Investment made by acquiring shares or assets of a company incorporated in Nepal
7) Investment received through banking system after issuing securities in foreign capital market by an industry or company established in Nepal
8) Investment made through technology transfer
9) Investment maintained by establishing and expanding an industry in Nepal.

Hence, in the given case, loan granted by International Finance Corporation to a hydro-electricity project company in Nepal does not qualify as foreign investment under section 2(j) of Foreign Investment & Technology Transfer Act, 2073. However, as per section 11 of the Act, any public company incorporated in Nepal or corporate body authorized to issue securities pursuant to

prevailing securities related law may issue bond, debenture or other securities in securities market of foreign securities to obtain loan or foreign currency after taking approval from Nepal Rastra Bank and Securities Board.

In order to make any foreign investment, investment should be made in afore stated sector prescribed by section 2(j) of the Act and before making such investment, the foreign investor has to obtain approval from the department of industry and other concerned authorities under chapter 3 of the Act as follows:

a) As per section 15(1) of the Act, any foreign investor desirous to invest in Nepal has to apply to the foreign investment approving authorities in the prescribed format along with time schedule for expatriating foreign investment in Nepal and action plan of investment in industry along with other particulars.
b) As per section 17 of the Act, the foreign investment and technology transfer should be approved by the foreign investment approving authority. It provides two different following authorities:
    i. Department of Industry as approving authority for foreign investments of up to NRs 6 billion.
    ii. Investment Board of Nepal as approving authority for foreign investments above NRs 6 billion.
c) Section 15(2) of the FITTA specifies that the approval will be provided within 7 days once complete application documents are submitted.
d) Section 16(1) of the FITTA provides that only notification to the NRB after obtaining the first approval from DOI will suffice to bringing funds, but sub-section (2) provides that procedures set out by NRB needs to be fulfilled.
e) Industries registered under the authority of different provinces of Nepal will require recommendation from Ministry of Industry of such state to approve foreign investment.

Question No. 13:

Mr. Harry a German Citizen wants to apply for visa for a period of five months to undertake research on industrial environment of Nepal. He desires to apply for the visa under the Foreign Investment and Technology Transfer Act, 1992. Will he be eligible for Visa under the provision of FITTA, 1992?

[December, 2005](5 Marks)

Answer:

Yes, Mr. Harry a German Citizen is eligible to get non-tourist visa under the provision of Section 30(1) of Foreign Investment and Technology Transfer Act, 2073. According to section 30(1), any foreigner, willing to visit Nepal for undertaking study and research activities on industrial environment with the objective of making investment here in Nepal, shall be provided a non-tourist visa for a period up to six months.

Question No. 14:

An application has been registered in the concerned department for the purpose of foreign investment and transfer of foreign technology for the following business:

i. Fishery
ii. Development of Cottage Industries
iii. Rural Tourism

Discuss whether the application can be entertained by the department concerned.

[December, 2004](5 Marks)

Answer:

The three industries quoted in the question have been included in the Category for which foreign investments are not remitted under section 3 (2) of the Foreign Investment & Technology Transfer Act, 2073

CHAPTER-8

LABOR ACT, 2074

[Note: All answers suggested hereby have been updated as per Labour Act 2074 and its Rules, 2075]

Question No. 1:

According to the Labour Act, 2074,Hiring Foreign Nationals is not open to the employer. However in certain cases, employer can employ foreign nationals by fulfilling the required legal process. State those conditions where an employer is allowed to employ foreign nationals. **(December 2022) (5 Marks)**

Answer:

Section 22 of the Labour Act, 2074 prescribes the provision regarding the conditions where an employer are permitted for hiring foreign nationals. According to it, the foreign national can only be hired if local skill sets are not available for the job. The New Labor Act also provides provisions on work permit for certain entities, the language of employment agreement, repatriation of salary and terms and condition of service etc.

General Provisions: No foreign nationals can be engaged in work without having obtained the work permit from the Department. Prior to engaging a foreign national in work, the entity must publish an advertisement in national level Daily Newspaper to fill the vacant posts by Nepali citizens. If no application is submitted or if no local skill set is available for any work after the vacancy publication foreign national can be hired for the work with the approval of Labor Department.

Work Permit for technicians for short period (Section 24): Technicians engaged for less than three (3) months to carry out repairing of any machinery or installing new technology or similar casual work may be provided work permit simply by recording in the Labor Department.

Employment Agreement: As per the New Labor Act, 2074 no foreign national can be engaged in work without the employment agreement which should be entered into either in language understandable by such foreign national or in English language. Unless otherwise provided in the agreement, the employment agreement continues for three years.

Repatriation of Income: The foreign nationals can repatriate their income in convertible foreign currency.

Work Permit Exemption Section (Section 24): The foreign nationals having diplomatic immunity or the foreign nationals who are exempted from work permit under the treaty or agreement entered into with Nepal government are exempted from work permit requirement.

Question No. 2:

XYZ limited has been employing workers through labour provider. In line with the requirements of the Labour Act, 2074, what are the liabilities of the main employer when workers are hired from labour providers? Do you think there lies any responsibilities of the main employer if remuneration are not provided to the workers?

(Dec, 2019) (5 marks)

Answer:

As per Section 64 of the Labour Act, 2074, following are the liabilities of the main employer who employs workers through labour providers.

1. Any main employer, when employing workers through a licensed labour provider, shall follow an agreement entered with such labour provider.
2. Main employer, before entering into an agreement, shall ensure that the provisions for the payment of' remuneration and benefits to the workers shall not be less than what is prescribed by the Act or the rules made under the Act.
3. Main employer shall acquire regular information on whether the labour provider is regularly providing remuneration and benefits to the workers hired from such labour provider or not.
4. On inquiry pursuant to sub-section (3), if it is found that the remuneration or benefits are not provided to the workers by the labour provider, the main employer shall immediately make a request to such labour provider for the payment of such remuneration and benefits and the Department or Office shall also be informed accordingly.
5. If the labour provider does not provide the remuneration and benefits as requested under sub section (4), the main employer shall inform the Department or the Office accordingly.
6. On receipt of the information pursuant to Subsection (5) or if the information about the non-payment of the remuneration and benefits by the labour provider is received through any other means, the Department or the Office may make the payment from the deposit or bank guarantee kept by such labour provider at the time of acquiring the license.
7. The main employer shall make necessary means and arrangement relating to the Occupational Safety and Health required to be complied in the workplace.
8. If the remuneration and benefits to be provided pursuant to the prevailing law increases after an agreement between a main employer and a labour provider is made, such amount of remuneration and benefits, to the extent of increment, shall also be paid by the main employer.
9. Hiring of workers is prohibited from any enterprise established with the involvement of the main employer or with the involvement of any manager or director or family member on his behalf'.
10. Other provisions relating to the liabilities of the main employer shall be as prescribed

According to Section 64(4) of the Labour Act, if it is found that the remuneration or benefits are not provided to the workers by the labour provider, the main employer shall immediately make a request to such labour provider for the payment of such remuneration and benefits

and the Department or Office shall also be informed accordingly. Hence, there are responsibilities of the main employer if remuneration are not provided to the workers by labour provider.

Question No. 3:

State the types of employments that can be employed as per the Labor Act?

[June, 2019] (5 Marks)

Answer:

As per section 10 of Labor Act, 2074, there are following types of employments that can be employed. Accordingly. Employer may engage a worker in any of the following employment:

a) Regular employment
b) Task based employment
c) Time based employment
d) Casual employment
e) Part time employment

Explanation: For the purpose of this Section:

1) "Regular employment,, means any employment other than those specified in sub-sections (b), (c) and (d)
2) "Task based employment" means an employment in which a particular task or service specified by the employer is required to be accomplished.
3) "Time based employment" means an employment in which a worker is required to provide a service or accomplish a task within a period fixed by the employer.
4) "Casual employment" means an employment in which a worker is engaged for seven or less than seven days within a period of one month to provide any service or accomplish a task given by the employer.
5) "Part time employment" means an employment in which a worker is engaged by the employer for thirty five hours or lesser than thirty five hours in a week to accomplish any work.

Notwithstanding anything mentioned in the employment contract, where a question arises as to whether the employment relationship is regular or not, it shall be determined on the basis of the nature of the work as prescribed.

Question No. 4:

Define the process of formation of Collective Bargaining Committee. Also explain the matters which could not be included in the collective demand.

[June 2018] (5 Marks)

Answer:

Section 116 of Labour Act 2074 prescribes about the formation of collective bargaining committee and submission of collective claim to the employer. As per the section 116(1), any enterprise employing 10 or more than 10 labourers shall have a Collective Bargaining Committee as follows. In other words, any of the following team shall be regarded as collective bargaining committee:

a) A team of representatives appointed for negotiation on behalf of the elected authorized trade union of the enterprise, or
b) A team of representatives nominated through a mutual agreement of all the unions in the enterprise, where an election for the authorized trade union pursuant to clause (a) could not be held or the term of the elected authorized trade union has expired,
c) A team of representatives supported with the signatures of more than 60% of the workers working in the enterprise, where an authorized trade union pursuant to clause (a) or a team of representatives pursuant to clause (b) could not be formed,

Afore stated collective bargaining committee, on issues relating to the interest of workers, may submit collective claims or demands in writing to the employer. However, as per section 116(3), submission of collective claims on the following matters is prohibited:

a. Matters which is contrary to the Constitution of Nepal;
b. Which may adversely affect the interest of any other person because it is based on groundless allegation without any proof;
c. Any matter which may affect the personal behavior of any employer or worker;
d. Matter which is not related to the enterprise;
e. Where a collective agreement has been made and the period specified in the act for such agreement has not expired yet;
f. Matters relating to contribution rate and benefits specified for the social security schemes;

Question No. 5:

The security guards of ABC Ltd. are contemplating of going on strike to press for their collective demands. Advise them on the right course of action to be taken in order to enforce their claims.

[June, 2004](5 Marks) [December, 2017](7 Marks) [June, 2012](5 Marks)

Answer:

a) Submission of collective claims [u/s 116]:

As per section 116 of Labour Act, 2074 aAny enterprise employing 10 or more than 10 labourers shall have a Collective Bargaining Committee for submitting collective claim to employer.

b) Hold consultation on collective claims [u/s 117]:

As per section 117, on submission of collective claims, the concerned employer shall give a notice in writing to the Collective Bargaining Committee within seven days from the date of

submission of such claims or demands stating the place and time for the consultation and settle it by mutual consultation.

c) Settlement through mediation [u/s 118]:

However, if not settled, any concerned party may give an application to the Office for the settlement of collective bargaining claims or demands through mediation pursuant to section 118 of the Act. On receipt of the application for mediation pursuant to sub section (1), the office shall call both the concerned parties and resolve the dispute through mediation. The proceeding of mediation under sub-section (2) shall be completed within 30 days from the date of application for mediation. Provided that it shall not be a constraint to extend the time through consent of the parties in case there is continuity in the negotiation. The dispute relating to the collective claims or demands shall end if any agreement, between the concerned two parties, is achieved in the negotiation held in presence of the office under sub section (3). The agreement signed pursuant to sub section (4) shall be binding for both the concerned parties.

d) Settlement of dispute through arbitration [u/s 119]:

Where the dispute is not resolved through mediation under section 118, such dispute relating to the collective claims or demands shall be settled through arbitration. For that purpose, the Ministry may form an arbitration panel ensuring representations from labourers, employers and the Government of Nepal.

Any party wanting to settle the dispute through arbitration shall submit claims in writing to the arbitrator as prescribed. On receipt of the claims pursuant to sub section (5), the arbitrator shall send a copy of such claims to the other party and provide an opportunity to such party to file a written statement in response to that. Hearing shall be conducted by the arbitrator on the specified date, time and place and the arbitration proceeding shall not be stopped simply on the ground that the other party has failed to be present or a written statement has not been filed. The arbitrator shall deliver the decision within 30 days from the date of ending of the hearing.

e) Right to strike for settlement of collective dispute [u/s 121]:

If the dispute could not be solved through arbitration, the Collective Bargaining Committee may, organize strike for the settlement of collective dispute. In order to organize a strike, a written notice along with claims or demands and the date from which the strike is to commence shall be submitted to the employer 30 days before organizing such strike and the office of the local administration as well as concerned labour office shall also be informed accordingly.

However, labourers deputed as watchmen or guards for the security of the enterprise shall not be permitted to get involved in strike during the time they are assigned in the work and do any

act pursuant to section 125. Hence, the dissatisfied security guards cannot go for strike pursuant to this section..

Question No. 6:

The management of Chhatiban Iron Factory wants to comply with the provisions of labour act and rules in their factory regarding the gratuity and provident fund facilities to their employees. How you, a legal consultant, advise the factory on this matter? Explain referring the provisions of labour law and rules.

[December, 2016](6 Marks) [December, 2014](5 Marks) [Final/June, 2010]

Answer:

i) Provident Fund:

Section 52 of Labour Act, 2074 prescribes about provident fund as follow:

1) Every employer shall deduct 10 percent of the basic salary of each labourer, add 100% amount equivalent to that and deposit the total amount for the purpose of provident fund.
2) The amount pursuant to sub section (1) shall be deposited in the Social Security Fund in the name of the concerned labourer making effective from the date such labourer commences his/her job.
3) Notwithstanding anything contained in the sub section (2), the employer, in the following situations, shall deposit the amount of the provident fund as prescribed:
   a) until the Social Security Fund does not come into operation
   b) until the law relating to Social Security Fund does not become effective for the concerned employer
4) Employers shall contribute the amount for provident fund from the date of the commencement of this Act for those labourers for whom the provident fund contribution was not made before this Act became effective.
5) The amount contributed for the provident fund in the retirement fund or any other similar fund established under the existing laws or the amount lying under the custody of the employer before the commencement of this Act shall be transferred to Social Security Fund in a prescribed manner after the commencement of this Act.
6) Notwithstanding anything contained in the section, the employer shall pay an amount equivalent to 10% of the basic salary in addition to the actual remuneration any labourer is entitled to receive, in case the amount for the provident fund could not be deposited in the Social Security Fund pursuant to sections (2) and (3).

ii) Gratuity:

1) Every employer shall contribute an amount equivalent to 8.33 % of the basic salary of each labourer every month and deposit it for the purpose of gratuity.

2) The amount pursuant to sub section (1) shall be deposited in the Social Security Fund in the name of the concerned labourer making effective from the date such labourer commences his/her job.
3) Notwithstanding anything contained in sub section (2), the employer, in the following situations, shall deposit the amount of the gratuity as prescribed:
    1. until the Social Security Fund does not come into operation
    2. until the law relating to Social Security Fund does not become effective for the concerned employer
4) Employers shall contribute the amount for gratuity from the date of the commencement of this Act for those labourers for whom the gratuity contribution was not made before this Act became effective.
5) The amount contributed for the gratuity in the retirement fund or any other similar fund established under the existing laws or the amount lying under the custody of the employer before the commencement of this Act shall be transferred to Social Security Fund in a prescribed manner after the commencement of this Act.
6) Notwithstanding anything contained in the section, the employer shall pay an amount equivalent to 8.33% of the basic salary in addition to the actual remuneration any labourer is entitled to receive, in case the amount for the gratuity could not be deposited in the Social Security Fund pursuant to sections (2) and (3).

Question No. 7:

Sound Limited is a manufacturing company, which holds very good share in the local market. But due to various reasons in recent time, it has decided to curtail production by 40% of its existing capacity for more than a year. Accordingly company has decided to retrench ten permanent workers, who have been working in the company for 67 months.

Suggest the sound Limited Company, the procedure to be observed while retrenching workers regarding the notice and compensation.

[June, 2004](5 Marks) [June, 2016](5 Marks)

Answer:

Section 145 of Labour Act, 2074 prescribes about the retrenchment of employees as follows:

1) Where an enterprise faces financial problems in its operation or the labourers become redundant because of merger of more than one enterprises or because of any other reason the enterprise needs to be closed down partially or completely, the employer may retrench labourers.
2) When retrenching the labourers pursuant to sub section (1), the employer, at least 30 days before the date for retrenchment, shall provide notice with information on the grounds for retrenchment, probable date for retrenchment and probable number of labourers to be retrenched to the Office and authorised trade union of the enterprise or in absence of such authorised trade union, to any trade union which is active or labour relation committee of such enterprise.

3) After serving the notice pursuant to sub section (1), the employer shall consult the concerned trade union or the labour relation committee in relation to the matters concerning alternatives to the retrenchment of labourers and the grounds and conditions for the selection of the labourers for retrenchment. If an agreement is reached, the employer may retrench the labourers accordingly.
4) Where the trade union or the labour relation committee does not want to hold any consultation pursuant to sub section (3) or fails to reach to an agreement in the consultation, the employer, after informing the Office about it, may retrench the labourers accordingly.
5) While retrenching the labourers pursuant to this section, normally it shall be done in the following order;
   a) foreign labourers;
b) comparatively, those labourers who have received more punishments for misconducts
c) labourers with poor work performance standard;
d) labourers who are hired at the last from among the labourers in the same category of work;
   Provided that the labourers who were appointed earlier may be retrenched first by stating the grounds for doing so without following the rule of retrenching the labourers first who were hired last.
6) Notwithstanding anything contained in sub section (5), unless otherwise agreed with the trade union, the office bearers of the Collective Bargaining Committee and the authorized trade union shall be retrenched last.
7) When retrenching the number of labourers, the employer shall pay a lump sum amount as compensation calculated at the rate of one month basic salary for number of years served to those labourers who have completed at least one year of employment in such enterprise.
   Provided that, if the service period is less than one year, the compensation shall be paid proportionately.
8) Notwithstanding anything contained in sub section (7), the labourer shall not receive the compensation pursuant to sub section (7), if he/she is entitled to receive unemployment benefit under the social security laws.
9) Where any enterprise is required to close down partially or completely in pursuance of the law or order of the Government of Nepal or Labour Court or any enterprise in the special economic zone is required to retrench its labourers, the provisions of sub sections (1), (2), (3) and (4) shall not be applicable.
10) Notwithstanding anything contained elsewhere in this section, the provision in this section relating to retrenchment shall not be applicable to any employer who employs ten or less than ten labourers.

Question No. 8:

Define Remuneration Determination Committee. And also explain its functions, duties and powers under the Labour Rules, 2049

[December, 2015](5 Marks)

Answer:

Definition:

Minimum Remuneration Fixation Committee is a permanent committee constituted by the Ministry of Labour, Employment & Social Security under section 107(1) of Labour Act, 2074 for the purpose of recommending minimum wage in the prescribed manner. The committee consists of representatives from the Government of Nepal, trade unions and employers' associations.

Functions, Duties and Power of the Committee:

As per section 107(2), the committee shall recommend the minimum wage for labourers. It may do so for the whole country or specific region or specific nature of enterprises or industries or employment sector.

As per section 107(3), grounds for the recommendation of minimum wage shall be determined by the Minimum Wage Fixation Committee itself.

As per section 108(4), the Minimum Wage Fixation Committee shall, in every two years, commence the process of reviewing the minimum wage from the month of Baishak.

As per section 108(4), other provisions relating to the meetings of the committee under sub section (1) including procedure shall be as prescribed.

Question No. 9:

Retrenchment and reinstatement of labour.

[June, 2015](5 Marks) [December, 2010](5 Marks)

Answer:

Retrenchment:

Section 145 of Labour Act, 2074 prescribes about the retrenchment of employees as follows:

1) Where an enterprise faces financial problems in its operation or the labourers become redundant because of merger of more than one enterprises or because of any other reason the enterprise needs to be closed down partially or completely, the employer may retrench labourers.
2) When retrenching the labourers pursuant to sub section (1), the employer, at least 30 days before the date for retrenchment, shall provide notice with information on the grounds for retrenchment, probable date for retrenchment and probable number of labourers to be retrenched to the Office and authorised trade union of the enterprise or in absence of such authorised trade union, to any trade union which is active or labour relation committee of such enterprise.
3) After serving the notice pursuant to sub section (1), the employer shall consult the concerned trade union or the labour relation committee in relation to the matters concerning alternatives to the retrenchment of labourers and the grounds and conditions for the selection of the labourers for retrenchment. If an agreement is reached, the employer may retrench the labourers accordingly.

4) Where the trade union or the labour relation committee does not want to hold any consultation pursuant to sub section (3) or fails to reach to an agreement in the consultation, the employer, after informing the Office about it, may retrench the labourers accordingly.
5) While retrenching the labourers pursuant to this section, normally it shall be done in the following order;
   a) foreign labourers;
b) comparatively, those labourers who have received more punishments for misconducts
c) labourers with poor work performance standard;
d) labourers who are hired at the last from among the labourers in the same category of work;
   Provided that the labourers who were appointed earlier may be retrenched first by stating the grounds for doing so without following the rule of retrenching the labourers first who were hired last.
6) Notwithstanding anything contained in sub section (5), unless otherwise agreed with the trade union, the office bearers of the Collective Bargaining Committee and the authorized trade union shall be retrenched last.
7) When retrenching the number of labourers, the employer shall pay a lump sum amount as compensation calculated at the rate of one month basic salary for number of years served to those labourers who have completed at least one year of employment in such enterprise.
   Provided that, if the service period is less than one year, the compensation shall be paid proportionately.
8) Notwithstanding anything contained in sub section (7), the labourer shall not receive the compensation pursuant to sub section (7), if he/she is entitled to receive unemployment benefit under the social security laws.
9) Where any enterprise is required to close down partially or completely in pursuance of the law or order of the Government of Nepal or Labour Court or any enterprise in the special economic zone is required to retrench its labourers, the provisions of sub sections (1), (2), (3) and (4) shall not be applicable.
10) Notwithstanding anything contained elsewhere in this section, the provision in this section relating to retrenchment shall not be applicable to any employer who employs ten or less than ten labourers.

Reinstatement:

Section 146 of Labour Act, 2074 prescribes about the reinstatement of retrenched employees as follows:

1) Where any enterprise, after the labourers are retrenched, resumes operation within two years or needs to hire more labourers, the preference for employment shall be given to the labourers retrenched pursuant to section 145.
2) Notwithstanding anything contained in sub section (1), any other persons may be hired, if the labourers who were retrenched fail to come in spite of notice issued as prescribed.

3) Where the employer does not issue any notice or does not hire the labourers who were retrenched, the concerned labourer may, within 35 days, submit an application in the Labour Court.
4) Other provisions relating to this matter shall be as prescribed.

Question No. 10:

Anima is a skilled worker in Babai Cement Ltd. in Dang, however due to her severe illness, she frequently absents in the company. The administrative officer threatens her to deduct her salary on the basis of the cost as to be paid to the substitute worker in place of Anima during her absent days. Is the act of administrative officer correct? Under what circumstances, the administrative officer can deduct her salary? Explain**.**

[December, 2013](5 Marks)

Answer:

Under Section 35 of the Labour Act, 2074, it is the responsibility of the concern General Manager to pay remuneration to the workers or employees on time as follows:

1) When paying the remuneration to the labourers, if the time is specified in the employment contract, it shall followed accordingly or in its absence, it shall be paid at the time determined by the employer.

   Provided that the remuneration to the following labourers shall be paid as follows:

   d) Any labourer working for less than one month shall be paid within three working days from the date of completion of the work.
   e) Any labourer engaged in a casual work must be paid immediately after the completion of the work.

2) Notwithstanding anything contained in sub-section (1), the interval between the dates for payment shall not be more than one month.

However, such remuneration can be deducted in certain cases as under Section 38 of the act as follows:

1) Except under the following conditions, no amount shall be deducted from the remuneration of labourers:

a) any tax or fees levied under the existing laws;
b) any amount required to be contributed for provident fund and insurance or any other social security benefits;
c) any amount to be deducted pursuant to the order of judicial/quasi judicial body or order of the arbitrator or decision;
d) an amount for any specified service or facility provided by the employer to the labourer;
e) wage for absenteeism ;

f) amount equivalent to the book value of the goods lost or loss in cash or kind caused willfully or negligently or the amount equivalent to the production cost in relation to the manufactured goods;
g) amount as specified for deduction from remuneration in the collective agreement;
h) membership fees charged by trade unions; and
i) loan or payment made in advance to the labourer by employer.

2) While deducting the amount pursuant to sub-sections (c), (d), (e), (f), (g), (h) and (i), it shall be deducted from the remaining monthly remuneration after the amount pursuant to sub sections (a) and (b) are deducted.
3) Maximum limit, procedure and other provisions relating to the deduction of amount under sub section (2) shall be as prescribed.

In the given case, the act of administrative officer of Babai Cement is correct to the extent if Anima has no more leave balances which was approved by her senior.

Question No. 11:

Silicon Nepal (P) Ltd is engaging a minor named Karan Jogi as its fulltime worker in project monitoring department for data entry job. How do you define minor as per Labor Act 2048 and also explain if Silicon Nepal can hire minor as its worker? Advise Silicon Nepal pertaining its compliance and punishment on hiring of minor under Labor Act, 2048?

[June, 2013](5 Marks)

Answer:

Labour Act, 2074 has not prescribed about the definition of minor. However, as per clause (a) of section (2) of Child Labour (Prohibition and Regulation) Act, 2056 [Amended by Some Nepal Acts Amending Act, 2074], "child" means a minor not attained the age of eighteen years.

As per section 5 of Labour Act 2074, employment of children in any work by any person against the prevailing laws is strictly prohibited.

Hence, Silicon Nepal cannot hire minor as its worker. As per section 19 of Child Labour (Prohibition and Regulation) Act, 2056, the entrepreneur engaging a minor in work illegally shall be liable to a punishment of imprisonment up to three months in maximum or a fine of ten thousand rupees in maximum or the both.

Question No. 12:

Get Well Limited, an industry established at Hetauda Industrial Town with the objective of manufacturing pharmaceutical components employees a total of 8 workers/employees. The Company wishes to recruit a Japanese national, on a permanent basis, as a skilled technician to operate its newly imported plant. Is Get Well Limited governed by the Labour Act, 1992? Advise the Company assuming that it was indeed under the purview of the Labour Act, 1992.

[December, 2003](5 Marks) [December, 2005](5 Marks) [June, 2005](5 Marks) [December, 2012](5 Marks) [June, 2010](5 Marks)

Answer:

As per clause (j) of section 2 of Labour Act 2074, "Enterprise" means any company or private firm or partnership firm or co-operative organization or association or any other organization established or incorporated or formed or operated pursuant to the prevailing laws with an objective to carry on any industry or occupation or service with or without any motive to make profit.

In order to appoint the Japanese national, Get Well Limited must, according to section 22 of the Act, do the following:

1) No employer shall employ any foreign national in any enterprise without acquiring work permit from the Department.
2) Notwithstanding anything contained in sub section (1), the employer, if unable to acquire skilled labourers from among Nepali citizens as required, may employ foreign labourers by staying within the scope of this Act.
3) Before employing foreign labourers pursuant to sub section (2), the employer, in order to acquire skilled labourers from among the Nepali citizens, shall publish an advertisement in national daily newspapers. On failure to receive applications from Nepali citizens as specified in the advertisement or Nepali citizens could not be selected, the employer may give an application along with the supporting documents for work permits to the Department for hiring foreign labourers.

   Provided that publication of advertisement shall not be required by different ministries of Government of Nepal, department, investment board, institution, organization fully or partly owned by the Government of Nepal or other authorized entities with regard to foreign citizen coming to work as technician or expert pursuant to this Act at subject mentioned under investment agreement concluded after taking approval of the Government of Nepal or concerned ministries*.
4) Upon receipt of an application under sub-section (3), the Department may issue work permits for the appointment of skilled foreign labourers, if the application and other supportive documents are found reasonable upon examination.
5) The employer employing foreign labourers after acquiring the work permits pursuant to sub section (4), shall make arrangement for the gradual replacement of foreign labourers by Nepali labourers.
6) Fees and other provisions relating to the work permits shall be as prescribed.

Question No. 13:

Write short note on Seasonal Institution.

[June, 2009](5 Marks) [Final/June, 2012] [June, 2008](5 Marks)

Answer:

Section 89 of Labour Act, 2074 prescribes about the provision for seasonal enterprises as follows:

1) The labourers of any seasonal enterprise shall be kept in reserve during the period of closure in off season.

Explanation: For the purpose of this section, "Seasonal Enterprise" means any enterprise which can be operated in a particular season only and it also includes an enterprise which cannot be operated for more than 180 days in a year.

2) Notwithstanding anything written in this Act, during the closure of any seasonal enterprise in off season, the labourers in regular employment shall be paid at least 25 percent of their remunerations which they are entitled to.
3) The office shall decide as to a question whether any enterprise is a seasonal or not.

Question No. 14:

Mr. Chandika Lama, the employer of Chandika Carpet Factory committed certain misconduct under the Labour Act, 2048. The workers of this factory made hue and cry demanding legal action and punishment against him. Now, answer the following under the Labour Act, 2048.

i) Identify the various defined misconducts of an employer;
ii) What legal action could be taken and punishment be imposed against Mr. Chandika Lama for his misconduct?

[December, 2011](3 Marks) [June, 2011](3 Marks)

Answer:

If the proprietor or manager commits any of the following acts, it shall be deemed as misconduct:

(a) In case he/she contravenes or disobeys this Act or the Rules made hereunder or any order or directive issued thereunder.
(b) In case the enterprise (Chandika Carpet Factory) is closed or the workers or employees are retrenched in contravention of this Act;
(c) In case a lock-out declared illegal is continued;
(d) In case any worker or employee is assaulted or manhandled or sexually harrased; or
(e) In case he/she performs any activity to incite or provoke the workers or employees in order to create dissension or enmity among the workers or employees.

Misconduct of Employer & Punishment by Department of Labour & Occupational Safety:

As per section 163(1), the department, after conducting necessary inquiry into the complaint on the following matters, may act as follows:

a) impose a fine of up to two hundred thousand rupees and issue necessary order within the scope of this Act to any labour provider supplying labourers without acquiring any license to do so or any person who hires labourers from such labour provider and employs them in the work;
b) impose a fine of up to Rs 200,000 to any person on the basis of number of foreign labourers he/she has employed in any work without taking work permit and an additional fine of Rs 5,000 per person per month in case such person continues to employ the foreign labourers in spite of the punishment imposed earlier.
c) impose a fine of up to Rs 1,00,000 and issue an order for equal treatment to any person who discriminates labourers at the time of hiring or during employment in violation of Chapter 2;

d) impose a fine of up to Rs 5,000 at the rate of Rs 10,000 per person and issue an order to give an appointment letter or execute an employment contract to any person who employs any labourer without giving an appointment letter or executing any employment contract;
e) take a departmental action pursuant to the prevailing law against any inspector who causes loss or damage through any act done negligently or wrongfully pursuant to Chapter 15;
f) issue necessary order in case any person does any unfair labour practice or transfers any labourer in an unjustified manner in violation of this Act or carries on activities relating to promotion in violation of the by-law of the enterprise;
g) issue necessary direction to the Office in case it does not perform any task within 30 days from the date of ending of the period prescribed in the Act or the rules made under this Act for the accomplishment of such act.
h) carry out necessary work for the settlement of dispute if such dispute relating to remuneration and benefits to be provided to labourers arises between a labour provider and a main employer;

Misconduct of Employer & Punishment by Office of Labour & Employment:

As per section 163(2), the office, after conducting necessary inquiry in relation to the application on the following matters, may act as follows:

a) make the employer pay the deducted amount and a compensation equivalent to two times of such deducted amount to the concerned labourer if such labourer is paid below the minimum wage or any remuneration or benefit is deducted in violation of the Act or the rules made under this Act.
b) impose a fine up to Rs 20,000 to any employer or labourer or person who obstructs the performance of duty by government employees or gives false description or statement or influences or attempts to influence in a wrong way;
c) impose a fine at the rate of Rs 10,000 per apprentice or trainee to the employer who engages any person as an apprentice or trainee in violation of the Act and issue an order to employ such apprentice or trainee on regular employment and pay the remuneration and benefits accordingly.
d) issue an order to the employer, who does not pay the amount of gratuity and provident fund or contribute the amount to the social security fund or pay medical expense or does not subscribe insurance for the purpose of compensation which labourers are entitled to receive under the Act or the rules made under this Act to pay compensation and a fine equivalent to an amount which is two times more than such compensation
e) issue a direction to the employer not to lay off labourers in violation of this Act or in a discriminatory manner, if he/she is doing so;
f) issue necessary direction to the employer who terminates the employment or prohibits any labourer from attending the work in violation of the Act, the rules made under this Act or the by-law.

Misconduct of Employer & Punishment by Labour Court [u/s 164]:

1) If any person is engaged in forced labour, the person doing so may be punished by the Labour Court with imprisonment up to two years or a fine up to five hundred thousand rupees or both and may require such person to pay remuneration and other benefits including a damage equivalent to two times of the such amount.
   Provided that if any person is engaged in forced labour outside the territory of Nepal, the person involved in such act shall be ordered to pay the expense incurred to bring the affected person to Nepal.
2) In case of death or disablement of any person as a result of non-compliance of provisions relating to Occupational Safety and Health under this Act or the rules made under this Act or death of any person as a result of occupational disease caused due to performance or non performance of any act or any part of the body is disabled or physical or mental state is adversely affected, the person involved in the act shall be punished pursuant to the provision in the prevailing law or in absence of such provision in the prevailing law, such person may be punished with imprisonment up to two years and make such person pay appropriate compensation to the affected person.
3) Where a corporate body commits any offence punishable under this Act, such body shall be punished with fines and if imprisonment is also prescribed for such offence, Chief Executive of such corporate body shall be imprisoned.

Right to appeal [u/s 165]:

1) Any person dissatisfied with the order or decision given by the Department or Office under this Act or the rules made under this Act may file an application for appeal in the Labour Court within 35 days from the date of such decision.
2) Any labourer dissatisfied with the decision relating to the termination of employment or punishment given for misconduct, such labourer may appeal in the Labour Court within 35 days from the date of notice of such decision or punishment.
3) Notwithstanding anything contained in sub section (2), if there is any provision in the by-law of any enterprise on internal appeal mechanism, nothing shall act as a constraint for making an appeal accordingly.
4) In pursuant to sub section (3), the affected party may appeal in the Labour Court within 35 days from the date of receipt of the notice of the decision given by the body with authority to hear appeal or from the date of failure to receive the notice about the decision within 60 days from the date of appeal.

Question No. 15:
Welfare Fund

[December, 2010](5 Marks)

Answer:
As per section 178(6) of Labour Act, 2074, the Welfare Fund established under Section 37 of the Labour Act, 2048 and section 13 of the Bonus Act, 2030 shall continue its operation until separate laws relating to social security are made.

Question No. 16:
Distinguish between Labour Court and Commercial Bench.

[Final/June, 2010](5 Marks)

Answer

There is a vast difference between a Commercial Bench and a Labour Court. Labour Court's main objective is to settle labour disputes arising between the Labours and the Management.

a) Labour Court:

Labour dispute is a kind of unique dispute. It is a dispute between haves and have not. It is to be settled on basis of principles of social justice. So Labour Act, 2074 has prescribed a special court to settle labour disputes like commercial bench as prescribed by the Companies Act 2006 called labour court. As per clause (w) of section (2) of Labour Act 2074, "Labour Court" means Labour Court established pursuant to section 151.

Section 151 of Labour Act, 2074 prescribes about the establishment of Labour Court as follows:

1) The Government of Nepal, through notification in the Nepal Gazette, shall establish required number of labour courts.
2) The jurisdiction and territory of the courts established pursuant to sub section (1) shall be as prescribed in the same notice published in the Nepal gazette.
3) The Labour Court shall consist of one Chairperson and two members.
4) Any sitting judge of the High Court or any person having the qualification of becoming a Judge of the High Court shall be qualified to be Chair-person or member of the Court.
5) Except when a sitting judge of the High Court is appointed as a member of the Court, the tenure of the Chair-person and other members shall be four years.
6) The employment conditions and benefits of the Chair-person and members of the court shall be the same as to that of judges of the High Court.

Court.

Labour Court can also take action against its contempt under section 154 of the Act.

b) Commercial Bench:

Section 169(1) of the Companies Act, 2006 provides for a Court to hear case under this Act. Accordingly section 2(z8) of the Companies Act, 2006 defines the "Court" as the Commercial Bench of a Court of Appeal specified by the Government of Nepal by a notification in the Nepal Gazette, with the consent of the Supreme Court. Later in 2009, the Government of Nepal created Commercial Benches at the Court of Appeal established at commercially located four places of Nepal. The jurisdiction of the Commercial Bench is provided to hear referred cases under four Acts, particularly Company, Insolvency, Secured Transaction, Competition Promotion and Market Acts of 2009. The judges of the Court of Appeal as designated by the Chief Justice of Nepal shall act as the judges of the Commercial Bench. The Commercial Bench shall be presided by a single judge as a Single Bench or a Division Bench of two judges. Other matters relating to the Commercial Bench are provided under Court of Appeal Regulation, 2006.

Commercial Bench is a specialized Court run by judges having knowledge and expertise of Commercial discipline. It is a new type of Bench or Court in Nepal established recently in order to provide for fast-track procedures for judicially settling commercial disputes with a view to promote commercial and industrial development in the country. It is a recent trend in most of the countries of the world to have such Commercial benches/courts, which is also followed in Nepal.

Question No. 17:

Welfare Officer under the Labour Act, 2048.

[June, 2008](5 Marks) [December, 2009](5 Marks)

Answer:

Not incorporated in Labour Act, 2074.

Question No. 18:

Write short note on Labor Tribunal.

[June, 2009](5 Marks)

Answer:

Section 120 of Labour Act, 2074 prescribes about the Labour Arbitration tribunal as follows:

1) The Government of Nepal, for the purpose of settling collective dispute through mediation and arbitration, may form an independent labour arbitration tribunal.
2) Where a labour arbitration tribunal is formed in pursuance of this sub section (1), all proceedings relating to mediation and arbitration under this Chapter shall be conducted through the tribunal accordingly formed.
3) Other provisions relating to the labour arbitration tribunal shall be as prescribed.

Question No. 19:

N K Singh, an employee of Impressive Soap (P) Ltd, did not receive his salary for the last 5 months. Mr. Singh is a regular employee who demanded his salary several times but the employer has not paid it as yet. What remedies are available to Mr. Singh under the Labour Act, 2048?

[June, 2008](5 Marks)

Answer:

Section 35 of Labour Act, 2074 prescribes about the payment of remuneration as follows:

1) When paying the remuneration to the labourers, if the time is specified in the employment contract, it shall followed accordingly or in its absence, it shall be paid at the time determined by the employer.

   Provided that the remuneration to the following labourers shall be paid as follows:

   a) Any labourer working for less than one month shall be paid within three working days from the date of completion of the work.
   b) Any labourer engaged in a casual work must be paid immediately after the completion of the work.

2) Notwithstanding anything contained in sub-section (1), the interval between the dates for payment shall not be more than one month.

In the given case, N K Singh has not received salary for last 5 months even after demanding several times. Now, he has to follow provisions prescribed under Chapter 18 of the labour Act, 2074 to recover his amount as follows:

a) Submission of individual claim pursuant to section 113 of the Act:

1) Any labourer having individual claim concerning the right entitled pursuant to this Act, the rules, prevailing laws or collective bargaining may submit an application in writing to the employer.
2) The employer shall give a written acknowledgment of the claim received in writing pursuant to sub-section (1).
3) The employer, after receiving the claim pursuant to sub section (1), shall settle the dispute relating to the claim within 15 days after consultation with the concerned labourer.
4) Notwithstanding anything contained in sub section (3), the time for the settlement of dispute may be extended through consent between the employer and the concerned labourer.

b) Application may be filed in the Office pursuant to section 114 of the Act:

1) Any concerned party, for the settlement of dispute under section 113 through mediation, may submit an application to the office in the following situations: a) if the employer does not give any notice for consultation within 7 days from the date of submission of the application pursuant to section 113 (1) b) if an agreement could not be reached after the consultation held pursuant to section 113(3) and 15 days from the date of submission of

application to the employer has elapsed.

2) After receipt of the application pursuant to sub section (1), the office shall notify the date and time to the employer and the concerned labourer for consultation.
3) The office shall settle the dispute relating to the claim within 21 days from the date of the receipt of the application pursuant to sub section (1) by holding consultation as required between the employer and the concerned labourer.
4) Notwithstanding anything contained in sub section (3), the time for the settlement of dispute may be extended through consent between the employer and the concerned labourer.
5) If an agreement is reached between the employer and labourer in the consultation held pursuant to sub section (3), such dispute relating to the claim shall be deemed to have been settled.
6) The agreement reached under sub section (5) shall be binding to both the parties.

c) Decision of the Office pursuant to section 115:

Where the dispute does not get settled pursuant to section 114, the office shall give decision within 15 days on the basis of evidences.

Question No. 20:

Bright Lights Company Ltd. is engaged in assembling and manufacturing electrical equipment. An extract of the opening balances of the company for the year 2063/64 is as under:

	(Rs. in Lacs)
Paid up capital	2,000
Bank borrowing	1,500
Trade creditors	1,000
Profit & Loss Account	(500)

The Company earned pre-tax profits of Rs. 900 Lacs in the financial year 2063/64.

Calculate the following:

i) Amount required to be transferred to Employees Housing Fund as per Labor Act, 2048.

ii) Amount to be set aside for employee bonus.

[June 2008](3+3=6 Marks)

Answer:

i) Legal provision regarding Employee Housing Fund has not been incorporated in Labour Act, 2074.

ii) Bonus Act, 2030 has been excluded from the syllabus of CAP-III.

Question No. 21:

An industry closes for six months every year during off season. During the period of closure it lays off 50 temporary workers and 50 permanent staff. The industry pays 30% salary as retaining allowance to the permanent staff.

(i) Examine the validity of the payment of retaining allowance.

(ii) Would the allowances and facilities payable be any different if the industry was closed for 3 months this year only due to special circumstances with the approval of Labor department?

[December 2007](7 Marks)

Answer:

i. Section 89 of Labour Act, 2074 prescribes about the provision for seasonal enterprises as follows:

1) The labourers of any seasonal enterprise shall be kept in reserve during the period of closure in off season.
   Explanation: For the purpose of this section, "Seasonal Enterprise" means any enterprise which can be operated in a particular season only and it also includes an enterprise which cannot be operated for more than 180 days in a year.
2) Notwithstanding anything written in this Act, during the closure of any seasonal enterprise in off season, the labourers in regular employment shall be paid at least 25 percent of their remunerations which they are entitled to.
3) The office shall decide as to a question whether any enterprise is a seasonal or not.

In the given case, assuming only the 50 permanent staffs are under regular employment, payment of 30% salary as retaining allowance is a valid one.

ii) Section 15 or Labour Act, 2074 prescribes about the provision of reserve period as follows:

1) Employer may stop the work and lay off the labourers in case special circumstances arise.
   Explanation: For the purpose of this section, "special circumstance" means shortage of electricity, water, raw material or lack of fund or inability to reach the workplace or work or operate the workplace because of any situation beyond control.
2) During the reserve period pursuant to sub section (1), the employment relationship between the employer and labourers shall continue.
3) Any employer employing ten or more than ten labourers may lay off labourers for a period of maximum fifteen days. In case the labourers need to be laid off for more than fifteen days, the employer shall be required to consult the authorised trade union or labour management committee.
4) Other provisions relating to lay off of labourers shall be as prescribed.

   In addition, section 39 of the Act prescribes about the remuneration for reserve period as follows:

   Labourers, who are laid off pursuant to this Act, shall be paid half of their remuneration (i.e. basic salary + allowance) which they are entitled to until the work is resumed by the employer.

Provided that such labourers shall not be required to give attendance in the workplace during the layoff period unless the requirement of attendance is mentioned in the notice issued relating to the layoff.

In the given case, if the industry is closed just this year due to special circumstances, assuming that it has law taken the required approval, all employees shall be paid 50% of their salary while they are put on reserve. All other facilities available to them shall continuously be made available to them. The employer may put the workers under reserve in similar jobs in the same industry or other industry under his control with similar salary. If the workers disagree to work in such other industry or do not come to work they may not be paid salary and other benefits. As per rule 6 of Labour Rule 2075, the employer may put the workers under reserve in other department, unit or any entity under control of the enterprise.

Question No. 22:

Write Short notes on:

a) Lockout by an institution
b) Restriction on presenting demand or claim under Labour Laws.

[December, 2007](2×5=10 Marks)

Answer:

a) Lockout by an Institution:

Section 124 of Labour Act, 2074 prescribes about lockouts as follow:

1) Where a strike is organized without giving a notice pursuant to this Act or continues the strike or collective dispute could not be settled through the procedure prescribed in the Act, the management may, by giving justifiable grounds, lockout the enterprise after acquiring an approval from the Department.
2) Before carrying out lockout pursuant to sub section (1), the management shall issue a notice of at least seven days along with a date for lockout to the labourers in case they do not end the strike.
3) Notwithstanding anything contained in subsections (1) and (2), where there is a possibility of causing loss to the enterprise because of gherao, physical unrest or any such type of act by the labourers during the period of strike, the management may lockout the enterprise. The notice along with justifiable reasons regarding such lockout shall be given to the Office or Department or Office of the Local Administration within 3 days.
4) On receipt of the notice pursuant to sub section (3), the Office of the Local Administration shall immediately make necessary security arrangement in the workplace.
5) The Department may at any time declare the lock-out of an enterprise illegal in case it appears unjustifiable or it is likely to disturb the peace and security of the country or it is likely to cause adverse affect on the economy of the country.
6) Notwithstanding anything contained in this section, lockout is prohibited in enterprises

providing essential services.

b) Restriction on presenting demand or claim

Same type of question was asked in June, 2018 as well for 5 marks.

Question No. 23:

Multination Manufacturing Ltd. has been run by 90 staffs. The total staff consists of 50 permanent staffs and labors and 40 daily wages temporary staffs. The recruitment of the daily wages staffs was done in the lot of 20 persons twice whereas recruitment of 50 permanent staffs was done in the lot of 30, 10 and 10 thrice. Due to the shortage of raw materials, the management of the factory decides to shut down a part of its plants and also decides to lay off all its daily wages staffs and 20 permanent staffs for the period of 6 months:

i. Which lot of permanent staffs will lay-off in the normal situation?
ii. What is the compensation payable to the lay off staffs?
iii. Will the amount of compensation be same if the factory is seasonal and the staffs have been lay-off for off season?

[December, 2006](5 Marks) [June, 2007](5 Marks)

Answer:

i) Section 145 of Labour Act, 2074 prescribes about retrenchment of employees from an enterprise as follows:

1) Where an enterprise faces financial problems in its operation or the labourers become redundant because of merger of more than one enterprises or because of any other reason the enterprise needs to be closed down partially or completely, the employer may retrench labourers.
2) When retrenching the labourers pursuant to sub section (1), the employer, at least 30 days before the date for retrenchment, shall provide notice with information on the grounds for retrenchment, probable date for retrenchment and probable number of labourers to be retrenched to the Office and authorised trade union of the enterprise or in absence of such authorised trade union, to any trade union which is active or labour relation committee of such enterprise.
3) After serving the notice pursuant to sub section (1), the employer shall consult the concerned trade union or the labour relation committee in relation to the matters concerning alternatives to the retrenchment of labourers and the grounds and conditions for the selection of the labourers for retrenchment. If an agreement is reached, the employer may retrench the labourers accordingly.
4) Where the trade union or the labour relation committee does not want to hold any consultation pursuant to sub section (3) or fails to reach to an agreement in the consultation, the employer, after informing the Office about it, may retrench the labourers accordingly.

However, where any enterprise is required to close down partially or completely in

pursuance of the law or order of the Government of Nepal or Labour Court or any enterprise in the special economic zone is required to retrench its labourers, the provisions of sub sections (1), (2), (3) and (4) shall not be applicable.

5) While retrenching the labourers pursuant to this section, normally it shall be done in the following order;
   a) foreign labourers;
   b) comparatively, those labourers who have received more punishments for misconducts;
   c) labourers with poor work performance standard;
   d) labourers who are hired at the last from among the labourers in the same category of work;

   Provided that the labourers who were appointed earlier may be retrenched first by stating the grounds for doing so without following the rule of retrenching the labourers first who were hired last.

6) Notwithstanding anything contained in sub section (5), unless otherwise agreed with the trade union, the office bearers of the Collective Bargaining Committee and the authorized trade union shall be retrenched last.

   Hence, in the given case, last appointed permanent staffs will get the first lay off. Accordingly, two lots of 10-10 permanents staffs appointed later and the entire daily wages staffs will get lay off.

ii) Amount of compensation payable to lay off employees has been prescribed under sub-section (7) of the section 145 as follows:

When retrenching the number of labourers, the employer shall pay a lump sum amount as compensation calculated at the rate of one month basic salary for number of years served to those labourers who have completed at least one year of employment in such enterprise.

Provided that, if the service period is less than one year, the compensation shall be paid proportionately.

Notwithstanding anything contained in sub section (7), the labourer shall not receive the compensation pursuant to sub section (7), if he/she is entitled to receive unemployment benefit under the social security laws.

iii) As per section 89 of Labour Act 2074, if the factory mentioned above is seasonal and regular staffs have been providing lay-off in off season, they will get the retention allowance to the tune of 25% of their normal salary during the lay off period.

Question No. 24:

Mr. Guruji, a driver with Kanchi Travels left Kakarvita at 6 a.m. in his bus carrying 43 passengers. He reached Krishnaveer at 1 p.m. but was stranded there till 6 p.m. because of heavy landslide. The road was cleared by the RNA jawans and the bus reached Kathmandu at 10 p.m. Calculate the overtime allowance that Guruji is entitled to, assuming that he earns a daily salary of Rs. 400.

[December, 2005](5 Marks) [December, 2004](5 Marks)

Answer:

As per clause (c) of sub-section (1) of section 86 of Labour Act 2074, where the labourers of the transportation service are required to work more than eight hours a day, they must be paid remuneration at the rate of 1.5 times of their ordinary rate of remuneration.

Provided that, if the labourers are paid any trip allowance, food allowance or any other allowance of similar nature, they shall be entitled to receive either the overtime payment or these allowances.

As per clause (d) of sub-section (1), if the vehicle breaks down before reaching the final destination or is required to be stopped in one place for any reason, such labourer shall receive only fifty percent of the allowances paid to him.

In the given case, Guruji daily salary is Rs. 400, which works out to Rs. 50 per hour considering 8 hours a day. The trip lasted 16 hours out of which he is entitled to 8 hours overtime allowance. Out of 8 hours, 3 hours were normal overtime hours and the remaining 5 hours were held up hours. Hence the total trip allowance receivable is:

Trip allowance= {(3 Hrs*Rs 50*1.5 times) + (5 Hrs*Rs 50*0.5 times)}

= Rs. 412.50

Question No. 25:

The Managing Director of Anusashan Ltd. deducted 25% salary of Lalu Yadav, an employee in the Milk marketing department on the pretext that Lalu talked more and worked less thereby also inducing his co-workers to perform below their potentials. Is the deduction justified? State if any relief is available to Lalu also outlining the appeal mechanism available, if any, to both the parties.

[June, 2005](5 Marks)

Answer:

Section 38 of Labour Act, 2074 prescribes about circumstances for deduction from remuneration as follows:

1) Except under the following conditions, no amount shall be deducted from the remuneration of labourers:

a) any tax or fees levied under the existing laws;

b) any amount required to be contributed for provident fund and insurance or any other social security benefits;

c) any amount to be deducted pursuant to the order of judicial/quasi judicial body or order of the arbitrator or decision;

d) an amount for any specified service or facility provided by the employer to the labourer;

e) wage for absenteeism ;

f) amount equivalent to the book value of the goods lost or loss in cash or kind caused willfully or negligently or the amount equivalent to the production cost in relation to the manufactured goods;

g) amount as specified for deduction from remuneration in the collective agreement;
h) membership fees charged by trade unions; and
i) loan or payment made in advance to the labourer by employer.

In the given case, the ground for salary deduction of Lalu Yadav is outside the purview of section 24 and is therefore not justified.

As per section 162 of Labour Act 2074, where any person, employer, labourer or officer acts in violation of the Act or the rules made under this Act, the person affected by such act or the concerned trade union with a written consent of the affected person may file a complaint pursuant to section 163 or 164 to the authority having decision making power within 6 months from the date of such act. As per section 163(2), if the employer makes unjustifiable deduction from the salary, the suffered employee may complain to labour office. Then, the office, after conducting necessary inquiry in relation to the application on the following matters, may make the employer pay the deducted amount and a compensation equivalent to two times of such deducted amount to the concerned labourer if the benefit is deducted in violation of the Act or the rules made under this Act.

Question No. 26:

Lakeside Hotel is running through a rough patch and is contemplating to keep some of its permanent employees on reserve for 1 month. Advise the Hotel Manager regarding the approval to be taken and remuneration to be paid during the period.

Would your advice remain the same if Hotel Thamel was a seasonal establishment and was closing during off season?

[December, 2003](5 Marks)

Answer:

i) Reserve:

Section 15 or Labour Act, 2074 prescribes about the provision of reserve period as follows:

1) Employer may stop the work and lay off the labourers in case special circumstances arise. Explanation: For the purpose of this section, "special circumstance" means shortage of electricity, water, raw material or lack of fund or inability to reach the workplace or work or operate the workplace because of any situation beyond control.
2) During the reserve period pursuant to sub section (1), the employment relationship between the employer and labourers shall continue.
3) Any employer employing ten or more than ten labourers may lay off labourers for a period of maximum fifteen days. In case the labourers need to be laid off for more than fifteen days, the employer shall be required to consult the authorised trade union or labour management committee.
4) Other provisions relating to lay off of labourers shall be as prescribed.

In addition, as per section 39 of the Act, labourers, who are laid off pursuant to this Act, shall be paid half of their remuneration (i.e. basic salary + allowance) which they are entitled to until the work is resumed by the employer.

Hence, if any employer employing ten or more than ten labourers lays off labourers for a period of more than fifteen days, the employer shall be required to consult the authorised trade union or labour management committee only. No any approval from concerned authority is required for laying off employees in reserve.

ii) Seasonal Enterprise:

Section 89 of Labour Act, 2074 prescribes about the provision for seasonal enterprises as follows:

1) The labourers of any seasonal enterprise shall be kept in reserve during the period of closure in off season.

   Explanation: For the purpose of this section, "Seasonal Enterprise" means any enterprise which can be operated in a particular season only and it also includes an enterprise which cannot be operated for more than 180 days in a year.
2) Notwithstanding anything written in this Act, during the closure of any seasonal enterprise in off season, the labourers in regular employment shall be paid at least 25 percent of their remunerations which they are entitled to.
3) The office shall decide as to a question whether any enterprise is a seasonal or not.

Hence, no any approval is required to be obtained even at closure of seasonal enterprise. However, only 25% of their remuneration shall be paid to employees unlike 50% as in reserve period.

CHAPTER-9

INSURANCE ACT, 2079 AND RULES

[Note: All answers suggested hereby have been updated as per Insurance Act, 2079]

Question No.:1

Insurance Act, 2049 states that no individual will run or cause to operate an insurance firm without first acquiring a certificate. As a result, anyone interested in conducting insurance business must first obtain a license from the appropriate authority. Answer with concerned provisions the conditions under which the insurance board may impose a restriction on the insurance business under the Insurance Act, 2049. **(December 2022) (7 Marks)**

Answer:

As per the section 136 of Insurance Act, 2079, Nepal Insurance Authority (NIA) may suspend the license of insurer for prescribed period or impose a ban entirely or partially to conduct any type of business being operated by the Insurer under any of the following circumstances:

- Minimum paid up capital not maintained,
- Decisions made for payment of insurance compensation not implemented within prescribed time or does not make payment,
- Situation arises that may cause serious damages to insured if insurance business is being operated,
- Insurance business is liquidated i.e. closed without the approval of NIA,
- Any activities or acts are carried out in contravention of this act or rules made hereunder or regulations, by-laws or other prevailing laws,
- Directions or orders from NIA not complied time and again

Before suspending or imposing a ban, NIA, shall provide a reasonable time-limit to submit clarification to the concerned Insurer clearly stating the reasons for imposing the ban on its Insurance Business by publishing a notice in two major newspapers and also in its website for the information of public in general.

If submitted clarifications are found to be satisfactory, NIA may remove such suspension or lift such ban.

Question No.:2

Insurance Policy Holder 'X' feels that Insurance Agent and Surveyor have acted against the rights and interest of him which caused him loss. Despite 'X's Policy claim no one was prepared to pay him compensation for the losses he sustained. Now in view of the legal provisions as per Insurance Act, 2049, suggest 'X' who is to pay him insurance compensation and the way out for recovering such compensation. **(June 2022) (7 Marks)**

Answer:

The insurer has been made responsible to pay the insured by Section 129 of the Insurance Act, 2079 as under:

1. The insurer shall be responsible and pay compensation to the insured, if any loss is caused to insured due to insurer, directors, officials, employees of insurer, insurance mediators or other insurance service provider.
2. If any loss is caused to the insured as mentioned above, Insured may file compliant to the Nepal Insurance Authority within prescribed time period.
3. After receipt of complaint as mentioned above, NIA conduct necessary investigation & provide a reasonable opportunity to the concerned insurer, directors, officials, employees or concerned insurance mediators to submit clarification within 7 days.
4. By accepting the clarifications or if clarifications is not received within prescribed time, the NIA may make compromise between complainer and insurer or order to make the payment of reasonable amount as compensation for loss or damages, so sustained if, any.
5. Any unsatisfied party may file an appeal to the high court within 35 days.

Question No. 3

No person will operate or cause to operate the insurance business without obtaining a certificate pursuant to the Insurance Act, 2049. Thus, who is interested to carry out insurance business it is mandatory to obtain license from the concerned authority. State the conditions where it may impose ban on the insurance business and when the registration of an insurer may be cancelled as per the Insurance Act, 2049*?*

(June, 2021) (8 marks)

Answer:

Ban (Section 136)

As per the section 136 of Insurance Act, 2079, Nepal Insurance Authority (NIA) may suspend the license of insurer for prescribed period or impose a ban entirely or partially to conduct any type of business being operated by the Insurer under any of the following circumstances:

- Minimum paid up capital not maintained,
- Decisions made for payment of insurance compensation not implemented within prescribed time or does not make payment,
- Situation arises that may cause serious damages to insured if insurance business is being operated,
- Insurance business is liquidated i.e. closed without the approval of NIA,
- Any activities or acts are carried out in contravention of this act or rules made hereunder or regulations, by-laws or other prevailing laws,
- Directions or orders from NIA not complied time and again

Before suspending or imposing a ban, NIA, shall provide a reasonable time-limit to submit clarification to the concerned Insurer clearly stating the reasons for imposing the ban on its Insurance Business by publishing a notice in two major newspapers and also in its website for the information of public in general.

If submitted clarifications are found to be satisfactory, NIA may remove such suspension or lift such ban.

Cancellation of registration (Section 137)

As per Section 137 of Insurance Act, 2079, NIA may cancel the registration of an Insurer in the following circumstances :

a) If the Insurer is banned under section 136 and such ban could not be lifted until 1 year of such ban,
b) If there occurs situation that may cause serious damages to insured if insurance business is being operated,
c) If court initiates insolvency proceedings of such insurer as per prevailing laws,
d) On receipt of application of cancellation of license, the process of cancellation of license had been completed.

Before canceling the registration, NIA, shall provide a reasonable time-limit to submit clarification to the concerned Insurer clearly stating the reasons for imposing the ban on its Insurance Business by publishing a notice in two major newspapers and also in its website for the information of public in general.

On cancellation of registration, settlement of liabilities shall be done as prescribed.

Question No. 4

A group of non-residential Nepalese intended to carry insurance business in Nepal. They have no knowledge about the legal provisions of Nepal in this respect. So they approached you as an expert for the registration of an insurance company as an insurer. How would you advise them regarding following:

i) Registration process of an insurance business.
ii) Cancellation of Registration of an Insurer. **[June, 2011](5 Marks)**

(Dec, 2020) (7 marks)

Answer:

i)

- As per Section 25 of Insurance Act, 2079, any person, who is desirous of undertaking insurance business according to this Act shall have to incorporate it by getting such insurance business registered as a public limited company in accordance with the prevailing laws. Provided that the insurance companies which has already been incorporated and in operation during commencement of this Act does not require to be incorporated as mentioned above.
- As per Section 26 of Insurance Act, 2079, Any person willing to incorporate a public company as per section 25 to conduct insurance business, have to submit an application to the Nepal Insurance Authority along with the prescribed fee for obtaining prior approval having enclosed therewith the prescribed documents.
- As per Section 27 of Insurance Act, 2079, NIA may refuse to issue prior approval to incorporate insurance business or open branch in Nepal by foreign insurer or to incorporate an insurance company in Nepal in joint venture with a body corporate registered in Nepal or a Nepali citizen on the prescribed circumstances.
- As per Section 28 of Insurance Act, 2079, Any person who had obtained prior approval as per section 26 and is registered as a company as per prevailing acts, desirous to undertaken insurance business, shall submit an application to the Nepal Insurance Authority along with following details and documents (28(1)):
    a. Prior approval granted by the Authority to incorporate insurance company,
    b) Registration Certificate of the incorporated insurance company,
    c) Copy of memorandum of association and articles of association of the insurance company,
    d) If promoter of insurance company is any company or corporate body, copy of previous three year's audited financial statements and evidence of tax clearance,
    e) If promoter of insurance company is any company or corporate body, name of substantial shareholders and details about their family members,
    f) The type of insurance business to be undertaken by the insurance company,
    g) Portfolio of the insurance business to be undertaken by the insurance company,
    h) Particulars of an office building equipped with all infrastructures required by the insurer to carry on financial transactions, or, if such building is to rented, a copy of the lease agreement and the particulars of the building to be rented, including that there are enough bases for making available insurance services and facilities,
    i) Personal details of chief executive officer and other managerial level officers,
    j) Documents relating to Risk management system,
    k) Details about investment policies, risk calculation, claims, reinsurance and information technology,
    l) Proposed insurance contract and in case of reinsurance company proposed reinsurance contract,

m) Document evidencing that the amount of the shares undertaken to be subscribed by promoters is paid and deposited,
n) Details about organizational structure,
o) Employees terms, conditions and facilities by laws along with their remuneration,
p) Financial, Administration and Procurement by laws,
q) Other details or documents as specified by NIA

As per Section 28(2) In case of branch or insurance company to be established in joint venture in Nepal by any foreign insurer, the following details and documents have also to be submitted in addition to those matters as mentioned in Sub-Section (1):

- ✓ Letter of consent or approval given by the government of the concerned country or regulating authority formed according to the laws of the concerned country of foreign insurer, for operating insurance transactions in Nepal by such foreign insurer,
- ✓ Registration Certificate of branch registered in Nepal,
- ✓ Upon obtaining prior approval from Nepal Insurance authority, if any details and documents submitted under section 26 are altered, details about such along with copy of such documents,
- ✓ Other details or documents as specified by Nepal Insurance Authority

- As per Section 29, NIA may issue license within 60 days to carry on insurance business after inquiry of the submitted details and after collecting prescribed fees.

ii) As per Section 137 of Insurance Act, 2079, NIA may cancel the registration of an Insurer in the following circumstances :

a) If the Insurer is banned under section 136 and such ban could not be lifted until 1 year of such ban,
b) If there occurs situation that may cause serious damages to insured if insurance business is being operated,
c) If court initiates insolvency proceedings of such insurer as per prevailing laws,
d) On receipt of application of cancellation of license, the process of cancellation of license had been completed.

Before canceling the registration, NIA, shall provide a reasonable time-limit to submit clarification to the concerned Insurer clearly stating the reasons for imposing the ban on its Insurance Business by publishing a notice in two major newspapers and also in its website for the information of public in general.

On cancellation of registration, settlement of liabilities shall be done as prescribed.

Question No. 5

Explain, what are the circumstances on which Certificate of Registration of the insurer may not be renewed?

[June, 2010](5 Marks)

Answer:

As per the Insurance Act, 2079 there is no provision regarding the renew of certificate of registration of insurer. However, NIA may cancel the registration of insurer in certain circumstances as per Section 137.

Question No. 6

Basic legal requirements for the Insurer to operate Life Insurance Business and Non-Life Insurance Business.

[Final/June, 2011](5 Marks)

Answer:

Rule 15A of the Insurance Regulation, 1993 basically requires the Insurer Operating the Life Insurance and Non-Life Insurance to operate such Insurance Business in the Form of Separate Organizations as under:

(1) The Insurer registered to operate the Life Insurance and Non-Life Insurance Business and has been operating the Life Insurance and Non-Life Insurance Business before the commencement of this Rule shall operate Life Insurance Business and Non-Life Insurance Business in the form of separate organizations from the date as specified by the Insurance Board.

(2) The Insurer operating the Life Insurance and Non-Life Insurance Business in the form of separate organizations pursuant to sub-rule (1) above shall comply with the terms and conditions as follows:
   (a) To manage to operate only one Insurance Business between the two Insurance Business being operated by amending in the Memorandum and Articles of Association and to establish another organization to operate the another Insurance Business under the prevailing law,
   (b) To have separate management for the separate organization operating separate Insurance Business pursuant to Clause (a) above.
   (c) To manage the collection of paid-up capital separately for each organization,
   (d) To comply with the terms and conditions specified by the Insurance Board relating to the operation of the Life Insurance and Non-Life Insurance Business separately.

(3) The Insurer shall establish a separate Insurance fund in the name of an organization operating Life Insurance Business for the amount of Life Insurance and in the name of an organization operating Non-Life Insurance Business for the amount of Non-Life

Insurance and shall deposit the amounts in the separate funds out of the amounts deposited in the Insurance fund pursuant to section 21 of the Insurance Act, 1992 while operating the Life Insurance and Non-Life Insurance Business in the form of separate organizations pursuant to sub-rule (1) and (2) above.

Question No. 7

State the provisions relating to payment against Life Insurance Claims.

[Final/December, 2011](5 Marks)

Answer:

In Chapter-16 of Insurance Act, 2079, there is provision regarding Insurance Claim. Section 123, 124, 125, 126 & 127 has provision regarding the insurance claim.

Section 123 has provision regarding the settlement of insurance claim. Below is the provision:

- Insurer shall make settlement of insurance claims created out of insurance contracts made as per the contract, after conduction of valuation of such claims if required or if no valuation is required with prescribed time.
- If the insured or his designee or legal heir as per prevailing laws could not be found or payment could not be done to such persons due to any reason, such amount shall be deposited in unclaimed fund with a condition to make payment.
- If the person to receive insurance claim could not be found, the insurer shall keep evidences about any means to search such person or attempts to make communication or evidence that insurer had used adequate means to make payment of claims.
- The insurer shall submit details about the claims which could not be settled within prescribed time, to NIA.
- Notwithstanding anything contained elsewhere in this act, separate procedures about payment of insurance claims in case of pandemics or any kind of distress that have incurred in any places may be made and implemented.

Question No. 8

Write the qualifications and disqualifications of an insurance surveyor.

[June 2012](5 Marks)

Answer:

i) As per Section 92(1) of Insurance Act, 2079, qualification of insurance surveyor shall be as prescribed by Nepal Insurance Authority. Also as per Section 92(2), before acquiring license, surveyor shall pass the prescribed examination.

Rule 28 of the Insurance Regulation, 1993 has prescribed the Qualification of an Insurance Surveyor as under:

(1) An applicant desirous of making an application for the Surveyor's License pursuant to Rule 26 of this Regulation shall have possessed any one of the following qualifications:

(a) Having gained at least ten years of work experience on the Insurance Business, holding an officer level post at the office of any Insurer,

(b) Having possessed at least a Bachelor Degree in engineering subject,

(c) Having possessed at least Bachelor Degree in Insurance subject from a Chartered Insurance Institute of international standard or from an organization recognized by such institute, or

(d) Having passed the Chartered Accountancy Examination.

(2) An applicant having possessed the qualification as referred to in above shall, prior to obtaining the Surveyor's License, have obtained a certificate indicating his participation in, and completion of the surveyor training conducted by the Insurance Board.

ii) Disqualification of the Insurance Surveyor:

No person shall become an Insurance Surveyor in the following circumstances pursuant to section 32 of Insurance Act, 1992:-

(a) If he/she has not attained the age of sixteen years,

(b) If he/she is of unsound mind,

(c) If he/she is an insolvent,

(d) If he/she has been convicted and sentenced to punishment by a court in the offense involving any type of theft, fraud or misappropriation or embezzlement of the property entrusted to him, or

(e) If he/she has done anything in the course of work regarding to the Insurance Business causing loss or damage to the Insurer or Insurance Policy Holder.

Generally, an insurer has to obtain certificate of registration to carry out insurance business. But such certificate is to be renewed every year by making an application along with prescribed fees at the end of Chaitra each year. However, the Board may not renew the certificate of registration of the insurer.

Question No. 9

What do you mean by 'Insurable Interest'? Explain.

[June, 2009](5 Marks)

Answer:

Insurable Interest" means some proprietary or pecuniary interest. The object of insurance is to protect the insurable interest. A man cannot insure the life of stranger but he can insure the life of himself and of persons in whose life he has a pecuniary interest. Person, who have insurable interest in different types of properties, are enumerated below:

i) Immovable Properties – Owners, Mortgagors and Mortgagees, Landlords and tenants, Vendors and Purchasers.
ii) Movable Properties – Owners, Pledgors and Pledgees, Bailors and Bailees, Carriers, all lien holders.
iii) A shareholder has an insurable interest in his share, an agent in his commission, a businessman in his stock-in-trade and in his profits.

Question No. 10
How an insurer settle the insurance claim if the Board cancelled the registration of the business?
[December, 2009](5 Marks)

Answer:
As per Section 137(4), settlement of insurance claim in case of cancellation of registration of insurer shall be as prescribed by Nepal Insurance Authority.

Question No. 11
Insurance Fund
[June, 2008](5 Marks)

Answer:
As per Section 38(1) of Insurance Act, 2079, Insurer shall maintain insurance fund in such quantity and in such ratio as prescribed by Nepal Insurance Authority.

As per Section 38(2, an Insurer shall maintain separate fund for each category (Portfolio) of Insurance Business and the amount to be received from each Insurance Business shall be deposited in the concerned fund.
Further as per Section 38(3), the fund maintained for one category (Portfolio) of Insurance Business shall not be deposited or utilized to bear the liabilities relating to other category (Portfolio) of Insurance Business.

Question No. 12
XYZ Ltd. has insured its assets with Unity Insurance Ltd. On the due date of renewal of the policies, the bank account signatories of XYZ Ltd. were out of the country and hence the Company was not in a position to pay the premium on time. Advise the Finance Manager of XYZ Ltd. as to whether he can get the policies renewed without paying the premium on the due date.
[June, 2008](5 Marks)

Answer:

As per Section 64(2) of Insurance Act, 2079, Insurer shall not accept insurance risk and issue insurance policy without receiving all insurance premium.

Section 64(3): Notwithstanding anything mentioned in sub section (2), if any practical difficulty arises due to any reason for paying the amount in a lump sum, this Section shall not be deemed to be prohibited to issue an Insurance Policy on the guarantee of a bank or the Nepal Government relating to the payment of the outstanding amount within a specified period. However, insurance policy shall not be issued against bank guarantee of period longer than thirty days.

Section 64(4): Notwithstanding anything mentioned elsewhere in this section, nothing shall hinder to issue insurance policy in case of life insurance in installments and in case of specific type/ category of non-life insurance business by payment of partial amount.

Section 64(5): If insurer do not receive the amount of insurance premium, in time, from the person or corporate body who has responsibility to collect insurance premium and make payment to insurer, the insurer shall provide information about such to the insured.

In the given case, the signatories of the M/S XYZ Co were out of the country. Thus the company has faced practical difficulties to pay the premium amount in time. Hence, the company's offer to submit a bank guarantee till the period its signatory come back is acceptable according to the section 64 of the Insurance Act. Unity Insurance can renew the insurance policy upon submission of a bank guarantee by XYZ Company for maximum period of 30 days.

Question No. 13

Relax Life Insurance Company, an entity registered in England wants to start life insurance business in Nepal. The Insurance Board finds that as per English law, Nepali Insurers are not allowed to conduct Insurance business in England.

(i) Should the Board grant license to Relax Life Insurance Company?

(ii) What should the Insurance Board do if Relax Life Insurance Company were an existing licensed life Insurer in Nepal?

[December, 2009](5 Marks)

Answer:

In Insurance Act, 2079, there is no such provision regarding the cancellation of license of insurer in circumstances where the head office of the insurance business of any foreign insurer is situated outside Nepal if it is felt that Nepali insurers have not been provided therewith facilities equivalent to those enjoyed by the foreign insurer according to the law of that country. However, below is the provision mentioned on old Insurance Act.

Section 10 of the Insurance Act, 1992 provides for the Registration of Insurers. As per Section 10(2) of the Act, any local or foreign corporate body desirous of engaging in insurance business must apply to the office of the Board in the prescribed form along with the prescribed documents and fees in order to have its name registered as an insurer. In view of this provision, if other

conditions are met, Relax Life Insurance Company by being an entity registered in England only does not pose any problem for it to get registered as an insurer in Nepal.

Section 13 of the Act provides the conditions on which the registration of an insurer may be cancelled. As per Sub-section 1(d) of Section 13, the Board may cancel the registration of an insurer in circumstances where the head office of the insurance business of any foreign insurer is situated outside Nepal if it is felt that Nepali insurers have not been provided therewith facilities equivalent to those enjoyed by the foreign insurer according to the law of that country.

In view of above provisions the answer to questions will be as follows:

(ii) Drawing conclusion from provisions of Section 13(1)(d), the company can not be registered as an insurer.

(iii)Even if the company is already a license holder, such license may be cancelled by the Board if it is felt that the Nepali insurers are not getting equal opportunity to conduct insurance business in England. If the license is cancelled then the concerned insurer has to refund the amounts as per the provisions of section 16.

Question No. 14

Write short notes on Actuary Valuation

[June, 2007](5 Marks) [December, 2006](5 Marks)

Answer:

As per clause (j) of section 2 of Insurance Act 2049, "Actuary" means a person having the qualification as prescribed and is appointed by the Insurer for assessing and calculating the liabilities of the Insurance Business.

An insurance company conducting life insurance business is required to have an actuary valuation to assess financial position and liabilities of the company once in every three years.

Question No. 15

Mr. Peaceful, aged 50, has taken life insurance policy of himself from XYZ Life Insurance Company in 2055 B.S. The insurance period is 20 years and insured amount is Rs. 10,00,000. His surviving family consists of his parents, one married daughter and one married son. He has not nominated any person as beneficiary of the insured amount. In B.S. 2060, Mr. Peaceful died of heart attack. Examine the validity of beneficiary of the insured amount in the light of the Insurance Act, 1992.

[June, 2007](5 Marks)

Answer:

Section 127 of the Insurance Act, 2079 states that in case any life insurance policy holder dies before the expiry of the term of his policy, the amount mentioned in such policy shall be paid to the person designated by him therein. In case he has not designated any person or in case the designee has already died, payment shall be made to any of his surviving related dependents in

sequential order. In case the insured have provided authority of insurance policy to anybody, that person have prior right to get amount of authorized limit.

In this case of Mr. Peaceful, he has not designated any person. Hence, the insured amount of Rs. 10,00,000 has to be paid to his surviving dependents. There are three categories of dependents surviving namely his married son, married daughter and his parents. Out of them the priority of parents comes earlier than the married son and daughter in the absence of wife and unmarried sons and daughters. Hence, the amount of insurance shall be paid to his parents.

Question No. 16

Distinguish between General Insurance business vs. Re-insurance business.

[June, 2006](5 Marks)

Answer:

General Insurance:

Section 2(l) of Insurance Act defines, General Insurance means all other forms of insurance business other than the life insurance business. The general insurance includes property insurance, liability insurance and other forms of insurance. Fire and marine insurance are strictly called property insurance. Motor, theft fidelity and machine insurances include the extent of liability insurance to a certain extent. The strictest form of liability insurance is fidelity insurance, whereby the insurer compensates the loss to the insured. When it is under the liability of payment to the third party.

Re-insurance:

Section 2 (m) of the Act defines, re-insurance means the business of re-insuring the portion of the risk that is in excess of the risk to be borne by the insurer. Re-insurance is arrangement whereby an original insurer who has insured a risk again insures a part of that risk with another insurer, i.e, reinsures a part of the risk in order to diminish his own liability. The difference between the retention and the total amount of acceptance is reinsured. The limiting or retention and effecting of reinsurance bring about a wider distribution of the risks and secure to the insurer the full advantage of the law of average.

Question No. 17

Principle of subrogation

[December, 2005](5 Marks) [December, 2009](5 Marks)

Answer:

Subrogation is the legal term for "standing in the shoes of which usually involves the representation of insurance companies seeking to recover on paid losses from liable third parties. It indicates the right of a person who has paid a liability or obligation of another to be indemnified by that person. In insurance contracts, subrogation means an insurer's substitution in place of the insured in regard to a claim against a third party for indemnification of a loss paid by the insurer.

Question No. 18
Average clause

[December, 2005](5 Marks)

Answer:
Average clause is a clause in a general insurance policy which discourages under insurance. The effect of the clause is that if the amount of the policy is less than the value of the subject matter insured, the insurer will be liable only for that proportion of the loss, which the amount of policy bears to the total value of the subject matter. For eg. If stock worth Rs. 40,000 is insured only for Rs. 30,000 and if the loss amount is Rs. 18,000, the claim admitted by the insurer will be:

=Rs. [18,000/40,000]*30,000 or Rs. 13,500 only.

Question No. 19
Yak Insurance Company Ltd., a newly established General Insurance Company obtains insurance contract of Everest Hotel for the F/Y 2062/63 (previously insured with Toyota Insurance) by quoting rates lower than the prescribed rates. Shikhar Insurance seeks your advice on whether this unethical deal can be sued against. Advise highlighting the possible rulings.

[December, 2005](5 Marks)

Answer:
Sub-rule 2 of Rule 18 of the Insurance Rules, 1993 states that no insurer may undertake insurance business by charging premium rates that differ from the rates prescribed by the Insurance Board. According to sub rule 3 if any insurer charges premium by altering the fixed rates, the Board may impose a full or partial ban on the insurer or it may cancel the insurance contract and transfer such business to the insurer who has undertaken the business prior to that.

In the given case, Yak Insurance has clearly violated Rule 18. Toyota Insurance is thus advised to lodge a complaint with the Insurance Board in which case it can re-claim the business of Everest Hotel for the financial year 2062/63.

Question No. 20
What are the compulsory Reserve Funds as prescribed by the Board to meet the liabilities pertaining to its insurance business inside the Kingdom of Nepal?

[June, 2004](10 Marks)

Answer:
As per Section 39 of Insurance Act, 2079, Every Insurer shall maintain a reserve fund as specified by the Board for the liability relating to its Insurance Business.

Following are the amounts to be deposited in Compulsory Reserve Fund (Sec 39(2))

A. **In case of Insurer undertaking Life Insurance Business**:

- An amount not less than the total liability as specified by the Actuary on the basis of the Insurance Policies published by the Insurer of the Life Insurance Business within Nepal.

B. **In case of Insurer undertaking Non-Life Insurance Business**:

- An amount not less than the amount specified by the Nepal Insurance Authority of the Net Insurance Premium shown in the income and expenditure of the Non-Life Insurance Business.
- Fifty percent of the profit earned until the amount equals the paid-up capital of the Insurer operating the Non-Life Insurance Business

Insurer may establish other reserve funds for operation of its business, as necessary. Other provisions relating to the compulsory reserve fund to be maintained by re-insurance companies shall be as prescribed. Other provisions related to compulsory reserve fund or other reserve funds shall be as prescribed.

Question No. 21

The management of a General Insurance Company seeks your advice to issue a policy on credit to one of its valued clients, covering comprehensive risks of a huge consignment of Equipment recently imported for its new project. What would you advice be to the Insurance Company?

[June, 2004](5 Marks)

Answer:

As per Section 64(2) of Insurance Act, 2079, Insurer shall not accept insurance risk and issue insurance policy without receiving all insurance premium.

Section 64(3): Notwithstanding anything mentioned in sub section (2), if any practical difficulty arises due to any reason for paying the amount in a lump sum, this Section shall not be deemed to be prohibited to issue an Insurance Policy on the guarantee of a bank or the Nepal Government relating to the payment of the outstanding amount within a specified period. However, insurance policy shall not be issued against bank guarantee of period longer than thirty days.

Section 64(4): Notwithstanding anything mentioned elsewhere in this section, nothing shall hinder to issue insurance policy in case of life insurance in installments and in case of specific type/ category of non-life insurance business by payment of partial amount.

Section 64(5): If insurer do not receive the amount of insurance premium, in time, from the person or corporate body who has responsibility to collect insurance premium and make payment to insurer, the insurer shall provide information about such to the insured.

Hence the General Insurance Company should collect certain portion of the premium upfront and obtain a HMG or bank guarantee for the payment of the balance within a specified to issue the policy.

Question No. 22

State the extent of exemption granted to a Life Insurance Company to provide loan, security or guarantee to its directors and/or his family.

[December, 2003](5 Marks)

Answer:

As per Section 69(1c) of Insurance Act, 2079, an insurance company shall not provide any type of loan to insured except on security of life insurance policy. However this provisions shall not restrict the insurer to provide loan or advance to its employees as per the provisions of employee services, terms and conditions and facilities bylaws.

Question No. 23

ABC group are interested to establish a non-life public limited insurance company in Nepal. The group has appointed you a consultant to provide the detail information regarding the minimum paid up capital, its composition among the promoters and others if:

a. It is a newly established company with in-country promoters.
b. It is a newly established company with foreign investment.
c. It is an existing company.

[June 2018](8 Marks) [December, 2004](5 Marks)

Answer:

As per the latest press release of NIA, the minimum paid up capital of Life Insurance Business is 5 Arba and Non-Life Insurance Business is 2.5 Arba.

As per section 4 of Insurance Registration and Insurance Business Operation Related Directive, 2073 issued by the Insurance Board, the paid up capital of a newly established insurance company shall be two billion rupees if it is a life insurance company and one billion rupees if it is a non-life insurance company. The composition among promoters of the proposed insurance company shall be as follows:

(i) A newly established company with in-country promoters:

As per section 5 of Insurance Registration and Insurance Business Operation Related Directive, 2073 issued by the Insurance Board, the proposed insurer desirous to obtain certificate of insurance business shall have divided its paid up capital structure as follow:

(a) Promoters group should have minimum 51 percent.
(b) For general public, at least 30 percent as an initial public offering.

(c) The proposed insurer may allocate, at least 5% of the total paid up capital as afore stated offered to public, for their staff.

(d) The promoters of the proposed insurance company has no any authority to invest in the proposed insurer by taking loan from any bank, financial institution and any other areas whatsoever.

(ii) Insurance with foreign investor:

As per section 6 of Insurance Registration and Insurance Business Operation Related Directive, 2073 issued by the Insurance Board, the foreign insurer desirous to operate insurance business under joint investment may invest up to 80% of its paid up capital. If the foreign investment is less than 50%, then 30% of the total paid up capital shall be allocated for general public.

However, if the foreign investor acquires 50% or more of shares, then the public offering should be made at least 15% of the total paid up capital.

Out of afore stated percent of shares allocated for public, the insurer may allocate up to five percent of such allocated shares for its employees.

(iii) In case of existing insurance company:

Section 7 of Insurance Registration and Insurance Business Operation Related Directive, 2073 issued by the Insurance Board prescribes about the provision related to paid up capital of insurer.

a) As per the section(1), those insurer which are operating insurance business after incorporating as an insurer at the commencement of this directive, shall maintain their paid up capital as mentioned under section 4 of this directive within Ashad 2075.

b) The insurers shall submit their capital plan within three months after the enforcement of this directive to the insurance board to maintain the paid up capital as mentioned under section 4 of the directive.

c) If any existing insurer that is in operation at the commencement of this directive has submitted the capital plan to increase capital as prescribed if could not manage to fulfill the proposed capital plan by increasing the paid up capital, it shall apply to the insurance board for extending the duration with appropriate reason at least seven days before the expiry of such time limit. The board if finds the reason appropriate may extend the time limit up to three months.

However, such extension of time limit shall not be provided more than two times.

d) If any existing insurer fails to fulfill the paid up capital as prescribed in the directive even after the extension of time limit as above, the board may direct such insurer to merge with the other existing insurer operating same business by prescribing the time limit.

Question No. 24

Explain the timeline for renewal of registration of Insurer. Under what circumstances certificate of Registration of the Insurer cannot be renewed? Answer.

[December, 2018](7 Marks) [December, 2015](5 Marks) [December, 2012](5 Marks)

Answer:

There is no provision regarding the renewal of registration of insurer under Insurance Act, 2079.

Question No. 25

Identify the circumstances under which the Insurance Board may cancel the insurance business being operated by an Insurer pursuant to the Insurance Act, 2049.

[June, 2017](8 Marks) [December, 2011](5 Marks)

Answer:

As per Section 137 of Insurance Act, 2079, NIA may cancel the registration of an Insurer in the following circumstances :

a) If the Insurer is banned under section 136 and such ban could not be lifted until 1 year of such ban,
b) If there occurs situation that may cause serious damages to insured if insurance business is being operated,
c) If court initiates insolvency proceedings of such insurer as per prevailing laws,
d) On receipt of application of cancellation of license, the process of cancellation of license had been completed.

Before canceling the registration, NIA, shall provide a reasonable time-limit to submit clarification to the concerned Insurer clearly stating the reasons for imposing the ban on its Insurance Business by publishing a notice in two major newspapers and also in its website for the information of public in general.

On cancellation of registration, settlement of liabilities shall be done as prescribed.

Question No. 26

Mr. Tilak has lodged claim in XYZ Insurance Company for the compensation of his fully damaged house by the April 2015 earthquake, but the insurance company after a long time, has paid very nominal amount as compensation. Mr. Tilak dissatisfied with the compensation has claimed to Insurance Board of Nepal to get appropriate compensation under Section 17 of the Insurance Act, 2049. How the Board deal the case as per Act? Explain.

[December, 2016](7 Marks)

Answer:

Section 128 of the Insurance Act, 2079 has provision regarding the complaint for compensation.

- Insured may submit a compliant to Nepal Insurance Authority if the insurance claim is not assessed within time, insurance claim is assessed to the disadvantage of insured or compensation is not paid. (Sec 128(1))
- After receipt of compliant as mentioned above, NIA to conduct necessary investigation & provide a reasonable opportunity to the concerned Insurer to submit clarification within 15 days. (Sec 128(2))
- By accepting the clarifications or if clarifications is not received within prescribed time, the NIA may take following actions (Sec 128(3)) :

  a) Make compromise between complainer and insurer,

  b) In case any loss or damages was caused to the insured due to not making payment of claims, order to pay such compensation of such losses or damages sustained, (Pay compensation along with interest @ 10 % from the day of complaint & all the expense incurred for such legal remedy shall be compensated by the concerned insurer.)

  c) If the liability for compensation determined by the insurer is not found to be reasonable, order to re-determine such liability,

  d) Order the concerned insurer to pay compensation to the insured, if payment of compensation is to be done,

  e) Issue any other appropriate orders.
- If any part is unsatisfied then that party may file an appeal to high court within 35 days of actions taken by NIA.

Question No. 27

Mr. Honest, one of the director of Hopeful Limited, an Insurance Company and Mr. Careless, son of Mr. Honest who is the managing agent of Optimistic Limited provides a loan of Rs. 50, 00,000 to Optimistic Limited for the period of five years at an interest rate of 10% p.a. Hopeful Limited timely received interest and accounted in its books of account. Whether, the above transaction is attracted under the provisions of the Insurance Act 1992? Decide.

[June, 2005](5 Marks)

Answer:

Section 69(2) of the Insurance Act, 2079, states that, the insurer shall not Provide loan or any kind of guarantee or security in loans taken to its director, director's family members, substantial shareholders, chief executive officer, any firm, company or corporate body in which the insurer or its director is managing agent or partner.

In the given situation M/s Hopeful Limited an Insurance Company provides a loan of Rs. 5,000,000 to M/s Optimistic Limited, a body corporate where Mr. Careless working as a Managing Agent, the son of Mr. Hones, who is one of the directors of Hopeful Limited. Therfore, Mr. Hopeful was

interested in Optimistic Limited and the Hopeful Limited violates the provisions of the Insurance Act 2079. No matter, the mere fact of that M/s Hopeful Limited invested its funds at an interest rate of 10% p.a. and receiving such interest timely and booked its books of accounts was not relevant and violations of the provisions will attract under the provisions of Insurance Act 2079.

Question No. 28

Insurance agent and insurance broker (in term of their qualifications).

[June, 2015](5 Marks)

Answer:

As per Section 92 of Insurance Act, 2079, qualification of insurance mediators or other insurance service provider shall be as prescribed by NIA. Before acquiring license by the insurance mediators, they shall pass the prescribed examination.

Also, as per Section 92(3) of Insurance Act 2079, the license of insurance brokers or third-party insurance facilitators shall be granted only to the following corporate bodies incorporated as per prevailing laws:

a) With the authorized capital as prescribed by the Nepal Insurance Authority,

b) The person working in the capacity of the General Manager of the corporate body shall have a 4 years' experience regarding the Insurance Business,

c) Others as specified by the Nepal Insurance Authority

Old Provision

Qualification of Insurance Agent

Any person who desires to apply for an Insurance Agent's License under Rule 19 must possess the following qualifications:

1. He must have passed at least the SLC or equivalent examination in order to work as an Insurance Agent for life insurance business.
2. He must be a literate person in order to work as an insurance agent for other insurance business.
3. He must have participated in an insurance agent's training program conducted by the Board, or an institution recognised by the Board, and received a certificate of having completed that training.

Qualification of Insurance Broker:

Any person applying for broker's license must have fulfilled the following conditions:

1. He must have won recognition as a corporate body subject to current law.
2. The authorized capital of the corporate body must amount to the figure prescribed by the board. Provided that the Board shall fix the amount of authorized capital by framing definite guidelines.

3. Twenty-five percent of the total authorized capital of the corporate body must have been deposited in term account of any commercial bank.
4. The person working as the Chief Manager of the corporate body must have gained 15 year experience in functions relating to insurance.
5. All other conditions prescribed by the Board must also be fulfilled.

Question No. 29

Burnburn Plastics Private Limited generally holds huge quantity of raw materials as stock in their godown. They got their stock insured with Settlefast Insurance Limited. Annual insurance premium for the fiscal year 2070/71 were Rs. 5 million. The company, due to its unfavorable cash flow, could pay Rs. 2 million through bank and arranged a bank guarantee of the remaining premium amount. Accidentally, stock of the company got damaged by fire and the company claimed for compensation with Settlefast Insurance Company. But the insurance company has denied to pay full compensation on the ground that premium was not fully paid. Give your opinion referring the provisions of the Insurance Act, 2049.

[December, 2014](5 Marks)

Answer:

Risk coverage is started after the insurance premium received by the insurer. As per Section 64(2) of Insurance Act, 2079, Insurer shall not accept insurance risk and issue insurance policy without receiving all insurance premium.

Section 64(3): Notwithstanding anything mentioned in sub section (2), if any practical difficulty arises due to any reason for paying the amount in a lump sum, this Section shall not be deemed to be prohibited to issue an Insurance Policy on the guarantee of a bank or the Nepal Government relating to the payment of the outstanding amount within a specified period. However, insurance policy shall not be issued against bank guarantee of period longer than thirty days.

Section 64(4): Notwithstanding anything mentioned elsewhere in this section, nothing shall hinder to issue insurance policy in case of life insurance in installments and in case of specific type/ category of non-life insurance business by payment of partial amount.

Section 64(5): If insurer do not receive the amount of insurance premium, in time, from the person or corporate body who has responsibility to collect insurance premium and make payment to insurer, the insurer shall provide information about such to the insured.

Due to the practical problem of not having sufficient cash, Burnburn Plastics provided bank guarantee for a part of the premium that the insurance company accepted. When time came to make good the loss of fire damage, the insurance company cannot deny to compensate just on the ground that premium was not paid. In the eyes of the Insurance Act, providing bank guarantee is

as good as paying premium in cash. Hence, the denial by the insurance company, Settlefast Insurance Ltd, is not valid.

Question No. 30

Settlement of claims after cancellation of insurance company.

[December, 2013](5 Marks)

Answer:

As per Section 137(4), settlement of insurance claim in case of cancellation of registration of insurer shall be as prescribed by Nepal Insurance Authority.

Question No. 31

Liability of an insurer.

[June, 2013](5 Marks)

Answer:

Section 128 of the Insurance Act, 2079 has provision regarding the complaint for compensation.

- Insured may submit a compliant to Nepal Insurance Authority if the insurance claim is not assessed within time, insurance claim is assessed to the disadvantage of insured or compensation is not paid. (Sec 128(1))
- After receipt of compliant as mentioned above, NIA to conduct necessary investigation & provide a reasonable opportunity to the concerned Insurer to submit clarification within 15 days. (Sec 128(2))
- By accepting the clarifications or if clarifications is not received within prescribed time, the NIA may take following actions (Sec 128(3)) :

  a) Make compromise between complainer and insurer,

  b) In case any loss or damages was caused to the insured due to not making payment of claims, order to pay such compensation of such losses or damages sustained, (Pay compensation along with interest @ 10 % from the day of complaint & all the expense incurred for such legal remedy shall be compensated by the concerned insurer.)

  c) If the liability for compensation determined by the insurer is not found to be reasonable, order to re-determine such liability,

  d) Order the concerned insurer to pay compensation to the insured, if payment of compensation is to be done,

  e) Issue any other appropriate orders.
- If any part is unsatisfied then that party may file an appeal to high court within 35 days of actions taken by NIA.

Question No. 32

Classification of surveyors under Insurance Act, 2049.

[Final/December, 2012](5 Marks)

Answer:

In Insurance Act, 2079, there is no specific provision regarding the classification of surveyors.

According to section 28(A) of Insurance Rule, 2049 all such surveyors as have been working as such after obtaining surveyor's license and thus completed the following periods of work shall be classified as follows and issued surveyor's license after the commencement of this rule:

b) Surveyors who have been regularly working as such for more than 15 years are classified as class A.
c) Surveyors who have been regularly working as such for 10 to 15 years are classified as class B.
d) Surveyors who have been regularly working as such for 5 to 10 years are classified as class "C".
e) Surveyors who have been regularly working as such for 5 years are classified as class "D".

Question No. 33

Axis Life Insurance Company Ltd. of India wants to establish its subsidiary in Nepal. List the various documents to be provided to various authorities in Nepal and permission to be obtained from the various authorities in Nepal.

[December, 2017](10 Marks)

Answer:

i) Approval for foreign investment pursuant to Foreign Investment & Technology Transfer Act, 2075:

The applicant Axis Life Insurance Co. Ltd, as a foreign investor intending to establish its subsidiary in Nepal has to file an application for approval of foreign investment under Section 15 of Foreign Investment and Transfer of Technology Act, (FITTA), 2075**.**

The following documents are required for approval under this Act with the Department of Industry:

1) Application in the prescribed format
2) Time schedule for expatriating foreign investment
3) Particulars for investment in industry along with its action plan
4) Other documents as prescribed

   As per section 17 of the Act, application shall be submitted to the Department of Industry if the foreign investment amount is up to Rs six billion and to the Investment Board, if the investment amount is more than it.
5) Copy of permission granted by the Insurance Board
6) Draft Memorandum and Articles of Association of the proposed company

7) Certificate of incorporation, including Memorandum of Association and Articles of Association, of the applicant foreign company
8) Company profile of the foreign investor Financial Credibility Certificate (FCC) of the Foreign Investor provided by the domiciled country bank
9) Authority letter from the concerned company to carry out any necessary work on their behalf, if applicable.
10) Resolution of the Board of Directors of Axis Insurance Company to open a subsidiary and invest in Nepal duly certified by Notary public.

ii) Registration as a subsidiary company under Companies Act, 2063:
Section 4 of Companies Act, 2063 [First Amendment, 2074] prescribes about the submission of application for the registration of company as follows:

(1) Any person desirous of incorporating a company pursuant to Section 3 shall make an application to the Office through electronic medium for the approval of proposed name.

(2) If the notice of company's name approval is received from the office pursuant to sub-section (1), the applicant shall upload and submit following documents to the office along with the application in the prescribed format:

(a) The memorandum of association of the proposed company,

(b) The articles of association of the proposed company,

(c) In the case of a public company, a copy of the agreement, if any, entered into between the promoters prior to the incorporation of the company,

(d) Prior approval obtained from the Insurance Board under Insurance Act, 2049 for the incorporation of a new public company to carry on insurance business,

(e) Permission obtained under the Foreign Investment & technology Transfer Act, 2075 to make investment or carry on business or transaction in Nepal,

(f) Where the promoter is a foreign company or body, a certified copy of the incorporation of such company or body and major documents relating to such incorporation.

iii) Registration of Insurance Company as per Insurance Act, 2079:
After the incorporation of public company under Companies Act 2063, Below is the provision regarding the registration of insurance company:

- As per Section 25 of Insurance Act, 2079, any person, who is desirous of undertaking insurance business according to this Act shall have to incorporate it by getting such insurance business registered as a public limited company in accordance with the prevailing laws. Provided that the insurance companies which has already been incorporated and in operation during commencement of this Act does not require to be incorporated as mentioned above.

- As per Section 26 of Insurance Act, 2079, Any person willing to incorporate a public company as per section 25 to conduct insurance business, have to submit an application to the Nepal Insurance Authority along with the prescribed fee for obtaining prior approval having enclosed therewith the prescribed documents.
- As per Section 27 of Insurance Act, 2079, NIA may refuse to issue prior approval to incorporate insurance business or open branch in Nepal by foreign insurer or to incorporate an insurance company in Nepal in joint venture with a body corporate registered in Nepal or a Nepali citizen on the prescribed circumstances.
- As per Section 28 of Insurance Act, 2079, Any person who had obtained prior approval as per section 26 and is registered as a company as per prevailing acts, desirous to undertaken insurance business, shall submit an application to the Nepal Insurance Authority along with following details and documents (28(1)):
    a. Prior approval granted by the Authority to incorporate insurance company,
    b) Registration Certificate of the incorporated insurance company,
    c) Copy of memorandum of association and articles of association of the insurance company,
    d) If promoter of insurance company is any company or corporate body, copy of previous three year's audited financial statements and evidence of tax clearance,
    e) If promoter of insurance company is any company or corporate body, name of substantial shareholders and details about their family members,
    f) The type of insurance business to be undertaken by the insurance company,
    g) Portfolio of the insurance business to be undertaken by the insurance company,
    h) Particulars of an office building equipped with all infrastructures required by the insurer to carry on financial transactions, or, if such building is to rented, a copy of the lease agreement and the particulars of the building to be rented, including that there are enough bases for making available insurance services and facilities,
    i) Personal details of chief executive officer and other managerial level officers,
    j) Documents relating to Risk management system,
    k) Details about investment policies, risk calculation, claims, reinsurance and information technology,
    l) Proposed insurance contract and in case of reinsurance company proposed reinsurance contract,
    m) Document evidencing that the amount of the shares undertaken to be subscribed by promoters is paid and deposited,
    n) Details about organizational structure,
    o) Employees terms, conditions and facilities by laws along with their remuneration,

p) Financial, Administration and Procurement by laws,
q) Other details or documents as specified by NIA

As per Section 28(2) In case of branch or insurance company to be established in joint venture in Nepal by any foreign insurer, the following details and documents have also to be submitted in addition to those matters as mentioned in Sub-Section (1):

- ✓ Letter of consent or approval given by the government of the concerned country or regulating authority formed according to the laws of the concerned country of foreign insurer, for operating insurance transactions in Nepal by such foreign insurer,
- ✓ Registration Certificate of branch registered in Nepal,
- ✓ Upon obtaining prior approval from Nepal Insurance authority, if any details and documents submitted under section 26 are altered, details about such along with copy of such documents,
- ✓ Other details or documents as specified by Nepal Insurance Authority

- As per Section 29, NIA may issue license within 60 days to carry on insurance business after inquiry of the submitted details and after collecting prescribed fees.

Question No. 34

What are the circumstances in which the Insurance Board may impose a ban or suspend entirely or partially any type of business being operated by the insurer under the Insurance Act, 2049?

[June, 2016](5 Marks)

Answer:

As per the section 136 of Insurance Act, 2079, Nepal Insurance Authority (NIA) may suspend the license of insurer for prescribed period or impose a ban entirely or partially to conduct any type of business being operated by the Insurer under any of the following circumstances:

- Minimum paid up capital not maintained,
- Decisions made for payment of insurance compensation not implemented within prescribed time or does not make payment,
- Situation arises that may cause serious damages to insured if insurance business is being operated,
- Insurance business is liquidated i.e. closed without the approval of NIA,
- Any activities or acts are carried out in contravention of this act or rules made hereunder or regulations, by-laws or other prevailing laws,
- Directions or orders from NIA not complied time and again

Before suspending or imposing a ban, NIA, shall provide a reasonable time-limit to submit clarification to the concerned Insurer clearly stating the reasons for imposing the ban on its

Insurance Business by publishing a notice in two major newspapers and also in its website for the information of public in general.

If submitted clarifications are found to be satisfactory, NIA may remove such suspension or lift such ban.

Question No. 35

Deepa Senjon from USA intends to carry on insurance business in Nepal. She has no knowledge about the legal provisions of Nepal in this respect. So, she approached you as an expert for the operation of an insurance company as an insurer. How would you advise her regarding following issues?

i) Registration process of an insurance business.
ii) Renewal and refusal of registration of an insurer.

[June, 2019] (5+5=10 Marks)

Answer:

iii)

- As per Section 25 of Insurance Act, 2079, any person, who is desirous of undertaking insurance business according to this Act shall have to incorporate it by getting such insurance business registered as a public limited company in accordance with the prevailing laws. Provided that the insurance companies which has already been incorporated and in operation during commencement of this Act does not require to be incorporated as mentioned above.
- As per Section 26 of Insurance Act, 2079, Any person willing to incorporate a public company as per section 25 to conduct insurance business, have to submit an application to the Nepal Insurance Authority along with the prescribed fee for obtaining prior approval having enclosed therewith the prescribed documents.
- As per Section 27 of Insurance Act, 2079, NIA may refuse to issue prior approval to incorporate insurance business or open branch in Nepal by foreign insurer or to incorporate an insurance company in Nepal in joint venture with a body corporate registered in Nepal or a Nepali citizen on the prescribed circumstances.
- As per Section 28 of Insurance Act, 2079, Any person who had obtained prior approval as per section 26 and is registered as a company as per prevailing acts, desirous to undertaken insurance business, shall submit an application to the Nepal Insurance Authority along with following details and documents (28(1)):
    a. Prior approval granted by the Authority to incorporate insurance company,
    b. Registration Certificate of the incorporated insurance company,
    c. Copy of memorandum of association and articles of association of the insurance company,

d. If promoter of insurance company is any company or corporate body, copy of previous three year's audited financial statements and evidence of tax clearance,
e. If promoter of insurance company is any company or corporate body, name of substantial shareholders and details about their family members,
f. The type of insurance business to be undertaken by the insurance company,
g. Portfolio of the insurance business to be undertaken by the insurance company,
h. Particulars of an office building equipped with all infrastructures required by the insurer to carry on financial transactions, or, if such building is to rented, a copy of the lease agreement and the particulars of the building to be rented, including that there are enough bases for making available insurance services and facilities,
i. Personal details of chief executive officer and other managerial level officers,
j. Documents relating to Risk management system,
k. Details about investment policies, risk calculation, claims, reinsurance and information technology,
l. Proposed insurance contract and in case of reinsurance company proposed reinsurance contract,
m. Document evidencing that the amount of the shares undertaken to be subscribed by promoters is paid and deposited,
n. Details about organizational structure,
o. Employees terms, conditions and facilities by laws along with their remuneration,
p. Financial, Administration and Procurement by laws,
q. Other details or documents as specified by NIA

As per Section 28(2) In case of branch or insurance company to be established in joint venture in Nepal by any foreign insurer, the following details and documents have also to be submitted in addition to those matters as mentioned in Sub-Section (1):

- ✓ Letter of consent or approval given by the government of the concerned country or regulating authority formed according to the laws of the concerned country of foreign insurer, for operating insurance transactions in Nepal by such foreign insurer,
- ✓ Registration Certificate of branch registered in Nepal,
- ✓ Upon obtaining prior approval from Nepal Insurance authority, if any details and documents submitted under section 26 are altered, details about such along with copy of such documents,
- ✓ Other details or documents as specified by Nepal Insurance Authority

- As per Section 29, NIA may issue license within 60 days to carry on insurance business after inquiry of the submitted details and after collecting prescribed fees.

iv) Renewal and refusal of registration of an insurer

There is no provision regarding the renewal of insurer in Insurance Act, 2079. Below is the provision regarding the refusal of registration of an insurer.

As per Section 27 of Insurance Act, 2079, NIA may refuse to provide prior approval to incorporate insurance business or open branch in Nepal by foreign insurer or to incorporate an insurance company in Nepal in joint venture with a body corporate registered in Nepal or a Nepali citizen on the following circumstances:

a) If name of the proposed insurer is similar to the name of another previously registered insurer company,
b) If the If the name of the proposed insurer or the insurance activities to be carried out by the proposed insurer is not found to be appropriate from the point of view of public interests, religion, ethnicity or traditional belief, etc.,
c) If study of the feasibility study report, details and documents other infrastructures submitted by the proposed insurer does not provide a ground to believe that it may carry on insurance transactions in a healthy and competitive manner,
d) If the objective of the proposed insurer is contrary to the prevailing laws,
e) If documents and detail as provided in section 26 is not submitted,
f) If every promoter had not undertaken to subscribe at least ten thousand shares in the proposed insurer company or if the details about share to be undertaken is not clearly disclosed,
g) If the Nepal Insurance Authority have reasons to believe that proposed insurer cannot maintain the paid up capital specified in section 36 of the Act,
h) If any of the promoters of the proposed insurer had been sentenced by court in relation to offence related to insurance or banking of finance or fraud or forgery or money laundering or corruption or human trafficking or kidnapping or hostage or other similar offences involving moral turpitude and a period of five years had not expired after serving such punishment,
i) If the proposed insurer had mentioned to carry out other business also in its objectives,
j) If prior approval is not to be granted as per section 31 of the Act,
k) If any of the promoters or his family members had been blacklisted as per prevailing acts and three years had not expired after removal from such black list,
l) If it is found that a investments in the proposed insurer by single promoter or his family members or corporate body or group is fifteen percent or more of the paid up capital. However, this provision shall not be applicable to the shares held by the Government of Nepal or Province Government or Foreign Investors.

m) If the person or his family member is substantial shareholder in another insurance company undertaking similar insurance business as proposed by the insurer.

Question No. 36

Make a legal comparison between the process of payment against life insurance claim and non-life insurance claim under the existing insurance law of Nepal.

[Final/June, 2010](5 Marks)

Answer:

In Chapter-16 of Insurance Act, 2079, there is provision regarding Insurance Claim. Section 123, 124, 125, 126 & 127 has provision regarding the insurance claim.

Section 123 has provision regarding the settlement of insurance claim. Below is the provision:

- Insurer shall make settlement of insurance claims created out of insurance contracts made as per the contract, after conduction of valuation of such claims if required or if no valuation is required with prescribed time.
- If the insured or his designee or legal heir as per prevailing laws could not be found or payment could not be done to such persons due to any reason, such amount shall be deposited in unclaimed fund with a condition to make payment.
- If the person to receive insurance claim could not be found, the insurer shall keep evidences about any means to search such person or attempts to make communication or evidence that insurer had used adequate means to make payment of claims.
- The insurer shall submit details about the claims which could not be settled within prescribed time, to NIA.
- Notwithstanding anything contained elsewhere in this act, separate procedures about payment of insurance claims in case of pandemics or any kind of distress that have incurred in any places may be made and implemented.

a) Process of Payment Against Life Insurance Claim: pursuant to rule 31 of Insurance Regulation, 1993:

(1) The Insurer shall issue a discharge voucher in the name of the Insured who has already paid the last installment of the Life Insurance Premium requesting him to come to collect payment against the claim along with the Insurance Policy and other documents required for making payment against such Life Insurance claim with fifteen days from the date of payment of such installment.

(2) In case an Insured submits the Insurance Policy and other documents including the discharge voucher to the Insurer for the payment of claim against the Life Insurance claim pursuant to sub-rule (1) above, the Insurer shall conduct an inquiry as required and make a payment against

the Life Insurance claim within seven days from the date of expiry of the period of the Life Insurance Policy.

(3) In case any person who has taken up an Insurance Policy dies before the expiry of the period of the Insurance Policy, the person designated by him, if any, and in case no person has been designated, the nearest heir from among the persons mentioned in sub-section (1) of section 38 of the Insurance Act shall submit an application for the payment against the claim to the Insurer to receive the amount of the Life Insurance stating the details as follows:-
   (a) The details relating to the claim,
   (b) A certificate of death of the insured,
   (c) In case the insured has died in an accident and if such risk is covered by the Life Insurance, the postmortem report of the government physician relating to the cause of death, and if there is no such report, a report of the police,
   (d) A certificate of relationship with the insured,
   (e) The documents regarding the certification of the age in case the age has not been certified,
   (f) Other details specified by the Board.

(4) After the receipt of the application pursuant to sub-rule (3) above, the Insurer shall make an inquiry into the details including the documents submitted regarding to the claim of Life Insurance, and shall examine other matters also necessary, and shall determine the liability within fifteen days from the date of receipt of such documents by it and shall issue the discharge voucher in the name of the applicant requesting him to come to collect the payment against the claim. The Insurer shall make the payment against the Insurance claim within fifteen days from the date of receipt the discharge voucher from the applicant.

(5) If it is found, while making an inquiry into the details pursuant to sub-rule (4) above that the Insurance claim need not to be paid by determining the liability, the Insurer shall provide a written information to the applicant clearly stating the reason thereof.

b) Process of Payment Against Non-Life Insurance Claim pursuant to rule 32 of the Insurance Regulation, 1993:

(1) If any claim has to be made under the Insurance Policy by an Insured who has taken up a Non-Life Insurance Policy, the Insured shall submit an application to the Insurer stating all the details relating to it.

(2) On receipt of an application of the Insured for the payment against the Insurance claim of the Non-Life Insurance Pursuant to sub-rule (1) above, the Insurer shall immediately designate a Surveyor to make necessary inquiry, if necessary.

(3) The Surveyor deputed pursuant to sub-rule (2) above shall make necessary inquiry and shall determine the liability of the Insurer within fifteen days and shall submit a report to the Insurer including the comprehensive details and also inform the Insured relating to it mentioning the amount to be received by the Insured subject to the terms and conditions and facilities of the Insurance Policy.

(4) The Insurer shall determine the liability and shall provide the payment against the claim of the Non-Life Insurance to the Insured generally within thirty-five days from the submission of the report by the surveyor pursuant to sub-rule (3) above.

CHAPTER-10

INTERNATIONAL FINANCIAL TRANSACTIONS ACT, 2054

[Note: All answers suggested hereby have been updated as per Some Nepal Acts Amending Act, 2075]

Question No. 1:
Write short notes on Trade Organization (WTO). **(June 2022) (3 Marks)**

Answer:
WTO stands for World Trade Organization, is the sole international body concerned with the provisions of cross-country trade, based in Geneva, Switzerland. Basically, there is an agreement called WTO agreement, which is duly signed and negotiated by member nations of the world and confirmed in their parliaments

In the real sense, WTO is a place, where the governments of member countries attempt to resolve their trade problems, encountered by them during the trade with other countries. The member governments (who can be ministers or their ambassadors or delegates) operate WTO and all decisions are also taken by consensus.

The organization helps the produces of goods and services deal in just and fair manner, to carry out their business throughout the world. It is aimed at liberalizing trade, for the benefit of all the nations, but it also imposes certain barriers, such as to provide protection to consumers or stop the spreading a disease.

The points of WTO can be listed as follows:

WTO is a global body, which superseded GATT and deals with the rules of international trade between member nations. WTO is a permanent institution along with a secretariat. The participating nations are called as member nations. WTO commitments are permanent. The scope of WTO is wider. WTO agreements are purely multilateral where the domestic legislation is not possible to continue. The dispute settlement system of WTO is very effective. In conclusion WTO is the foundation that made open trade between nations but also maintained some barriers for the benefit of all.

Question No. 2:
Define the purposes, functions, duties and power of the Accreditation Committee (International Financial Transactions Act, 2054).

[June, 2021/December, 2016](5 Marks)

Answer:
Pursuant to section 11 of the International Financial Transactions Act, 2054 an International Financial Transactions Accreditation Committee consisting of the following members shall be formed for the purpose of granting licenses to international financial entities to carry out international financial transactions, and for the purpose of regulating financial transactions to be carried out by such entities.
Section 12 of this Act provides the following functions, duties and powers of the Accreditation Committee:

The Accreditation Committee shall, apart from the functions, duties and powers set forth elsewhere in this Act, have the following functions, duties and powers:-

The functions, duties and power of the Accreditation Committee under section 12 of the International Financial Transaction Act, 2054 are as follows:

a) To monitor and supervise the financial activities of license holder entities as to whether or not their international financial transaction activities are in line with the provisions of this Act or Rules made thereunder, or other prevailing laws relating to international financial transactions,
b) To make recommendations to the Promotion Board in respect of facilitates to be accorded to international financial entities for the purpose of making Nepal as an attractive centre for international financial transactions,
c) To make recommendations to the Promotion Board in respect of improvements to be made in the existing laws related with international financial transactions for the purpose of carrying out international financial transactions in an effective and well-managed manner,
d) To inquire as to whether or not a license holder entity is fulfilling the conditions required to be fulfilled under the provisions of this Act and to require it to fulfill them if they are found not to have been fulfilled,
e) To give necessary instructions to license holder entities in respect of international financial transactions.
f) To avail itself of the service of national or foreign experts or specialized agencies for the promotion and development of international financial transactions,
g) To comply with the instructions given from time to time by the Promotion Board,
h) To suspend or revoke, as may be required, the license obtained by any license holder entity in cases where it is in violation of the provisions of this Act or Rules made thereunder, or the existing laws relating to international financial transactions: Provided that, such an entity shall be given an opportunity to submit its explanation before such revocation.
i) To perform such other acts, as may be prescribed, for making international financial transactions effective.

Question No. 3:

What is international financial transaction? State Bank of Gujarat (SBG) is willing to carryout international financial transactions. Give your advice as to the authority that grants a license to SBG and also state the formation of the authority granting license for the international financial transaction under the International Financial Transaction Act, 2054.

(Dec, 2020) (5 marks)

Answer:

Section 2(a) of International Financial Transaction Act, 2054 (IFTA) has defined the term "International Financial Transaction" as any financial transaction carried out by any license holder entity under this Act.

In accordance with section 3 of the IFTA the Accreditation Committee grant a license and to regulate to an international financial entity interested to carryout international financial transactions.

The formation of Accreditation Committee as mentioned in the section 11 of the Act is as follows:

(a) Governor, Nepal Rastra Bank - Chairperson

(b) Secretary, Ministry of Finance - Member

(c) Secretary, Ministry of Law and Justice - Member

(d) One person nominated by Government of Nepal from among CAs - Member

(e) One person nominated by Government of Nepal from among Economists - Member

The Accreditation committee may invite national or foreign experts or advisors involved in international financial transactions to participate at its meetings as observers.

An officer-level employee of Nepal Rastra Bank as designated by the Accreditation Committee with the consent of the Nepal Rastra Bank shall act as Secretary of the Accreditation Committee.

Question No. 4:

Yeti business group has incorporated an International Merchant Bank in Nepal. In Fiscal Year 2076/077, this bank is willing to do as international financial transactions. Can this bank obtain the license to carry on the international financial transactions? List out the financial entities which may authorize to obtain licenses to carry out the international financial transactions under the International Financial Transactions Act, 2054.

(Dec, 2019) (6 marks)

Answer:

Section 4(1) of the International Financial Transactions Act, 2054 has provided the certain financial entities which may be provided the license to carry out international financial transactions. Therefore, the International Merchant Bank can obtain the license to do international financial transactions.

Further, the following financial entities may be authorized to obtain licenses to carry out international financial transactions under this Act:

(i) Foreign bank and trust companies,
(ii) International insurance and reinsurance companies,
(iii) Companies serving as the registered offices for foreign companies,
(iv) International holding and investment companies,
(v) Administrative or regional offices established by foreign companies,
(vi) International trading companies,
(vii) International finance companies,
(viii) Foreign real estate holding companies,

(ix) Foreign Patent and royalty companies,
(x) Foreign mutual funds,
(xi) International leasing companies,
(xii) International merchant banks,
(xiii) Entities such as foreign partnership and trusts established as body corporate,
(xiv) International sales transaction companies,
(xv) Foreign entities to allow nonresident pensions or deferred bonus plans,
(xvi) International financial companies providing services like stock broker, underwriter, investment advisor, pension fund advisor.

Question No. 5:

What connotes 'International Financial Institutions' under the International Financial Transaction Act, 2054? What acts the International Financial Institutions are forbidden from doing in Nepal? State the facilities and concessions granted to such institutions in Nepal under the Act.

[June, 2019](7 Marks)

Answer:

Pursuant to section 2(a) of International Financial Transactions Act, 2054 "International Financial Transactions" means any financial transaction carried out by any license holder entity under this Act.

International financial entities are not allowed to do the following acts pursuant to section 5 of this Act, as under:

(a) To purchase any kind of immovable property within the Nepal or to keep in their name otherwise,

(b) To carry out any type of international financial transaction with any person resident of Nepal,

(c) To purchase shares or debentures of any company incorporated in Nepal under the existing laws,

(d) To open an account in any commercial bank of Nepal:

Provided that an account may be opened in any commercial bank with the permission of the Accreditation Committee for the purpose of running the day-to-day administrative business of the office up to such amount as may be fixed by the Accreditation Committee.

Following facilities and concessions are granted to International Financial Institutions:

No restrictions on brining in Foreign Currencies (section 6 of this Act):

1. No restriction of any kind shall be imposed on a license holder entity to bring in foreign currencies as may be required for international financial transactions.
2. No restriction of any kind imposed by the existing laws relating to foreign exchange shall apply in relation to a license holder entity.

Fund to be allowed repatriation (section 7 of this Act):
A license holder entity may repatriate outside Nepal the foreign currencies earned by it by carrying out international financial transactions and the foreign currencies brought in by such entity for the purpose of carrying out international financial transactions.
Provided that no property or capital accrued from any illicit or illegal act shall be allowed to be repatriated

Nationalization not to be done (section 8 of this Act):
The capital or the property of any entity shall not be subjected to nationalization.

Question No. 6:
Outline the functions that an International Financial Institution is prohibited from undertaking
[December, 2008](5 Marks)[June, 2016](5 Marks)

Answer:
Section 5 of International Financial Transaction Act, 1998 has provided about the functions which International Financial Institutions should not perform. Such functions are following:
(i) To Purchase any kind of immovable property within Nepal, or keep such property in their names in any manner.
(ii) To conduct any type of international financial transactions with persons residing in Nepal.
(iii) To purchase shares or debentures of any company established in Nepal according to current laws.
(iv) To open accounts in the commercial banks of Nepal.

Provided that with the approval of the Implementation Committee, an international financial institution may open an account in any commercial bank with an amount not exceeding the limit prescribed by the Implementation Committee in order to carry out its routine administrative functions.

Question No. 7:
Describe the functions, duties and power of International Financial Transactions Promotion Board.
[December, 2015](5 Marks)[December, 2011](5 Marks)

Answer:
As provided under section 10 of the Act the Promotion Board shall have the following functions, duties and powers:
(a) To frame necessary policies for the promotion of international financial transactions,
(b) To cooperate with Government of Nepal in the formulation of necessary laws so as to promote international financial transactions,

(c) To maintain or cause to be maintained coordination among the concerned governmental, non-governmental and international entities in matters of international financial transactions,
(d) To make necessary recommendations to Government of Nepal in respect of exemptions, facilities and concessions to be accorded to international financial entities for the purpose of establishing Nepal as an attractive center for international financial transactions,
(e) To hear appeals filed by any international financial entity against the suspension or revocation of its license by the Accreditation Committee,
(f) To perform such other functions as may be deemed necessary for promoting international financial transactions.

Question No. 8:

Persons Residing in Nepal.

[December, 2006](5 Marks)[Final/December, 2012](5 Marks)

Answer:

As per clause (g) of section 20 of International Financial Transaction Act 2054, persons residing in Nepal mean any of the following persons:

i. Nepali nationals other than those who are residing outside Nepal by engaging in any service, trade or any other enterprise, or for any other purpose, for a period longer than the prescribed period.
ii. Non-Nepali nationals residing in Nepal by engaging in service trade or any other enterprise for a longer than the prescribed period.
iii. Any institution registered in Nepal under current laws.

Question No. 9:

The governor of Nepal Rastra Bank is confused about formation of International Financial Transactions Accreditation Committee. Please advise the governor.

[December, 2012](5 Marks)

Answer:

Section 11 of International Financial Transaction Act, 2054 has consisted of the provisions concerning formation of International Financial Transactions Accreditation Committee. An International Financial Transactions Accreditation Committee consisting of the following members shall be formed for the purpose of granting licenses to international financial entities to carry out international financial transactions, and for the purpose of regulating financial transactions to be carried out by such entities:

a) Governor, Nepal Rastra Bank- Chairperson

b) Secretary, Ministry of Finance - Member
c) Secretary, Ministry of Law and Justice - Member
d) One person nominated by Government of Nepal from among Chartered Accountants - Member
e) One person nominated by Government of Nepal from among economists - Member

The Accreditation committee may invite national or foreign experts or advisors involved in international financial transactions to participate at its meetings as observers. The tenure of office of the members nominated under point (d) and (e) above shall be two years. An officer-level employee of Nepal Rastra Bank as designated by the Accreditation Committee with the consent of Nepal Rastra Bank shall act as secretary of the Accreditation Committee. The office of the Accreditation Committee shall be located at Nepal Rastra Bank. The working procedures of the meetings of the Accreditation Committee shall be as prescribed.

Question No. 10:

An international financial institution wants to open an account in a Nepalese commercial bank. Advise the legality of it.

[Final/June, 2012](5 Marks)

Answer:

As per Section 5 of International Financial Transactions Act, 2054 international financial institutions may not perform the following functions:

(a) To purchase any kind of immovable property within the Kingdom of Nepal, or keep such property in their names in any manner.
(b) To conduct any type of international transactions with persons residing in Nepal.
(c) To purchase shares or debentures of any company established in the Kingdom of Nepal according to current laws.
(d) To open accounts in the commercial banks of the Kingdom of Nepal.

Provided that with the approval of the Implementation Committee, an international financial institution may open an account in any commercial bank with an amount not exceeding the limit prescribed by the Implementation Committee in order to carry out its routine administrative functions.

Hence, they may open an account in a Nepali commercial bank with approval of the committee.

Question No. 11:

What are the functions, duties and powers of the 'Implementation Committee' under International Financial Transactions Act, 2054?

[Final/June, 2010](10 Marks)

Answer:

Section 12 of International Financial Transaction Act 2054 provides various functions, duties and powers of the Implementation Committee formed under section 11 of the Act which are as follows:

a) To monitor and supervise as to whether or not licensed institutions are conducting international financial transactions in accordance with this Act and the rules framed hereunder or other current laws relating to international financial transactions.
b) To offer suggestions to The Promotion Board in connection with facilities to be provided to international financial institutions in order to establish Nepal as an attractive international financial transactions center.
c) To offer suggestions to The Promotion Board in connection with reforms to be introduced in current laws relating to international financial transactions in order to conduct international financial transactions in an effective and systematic manner.
d) To conduct investigations as to whether or not licensed institutions have fulfilled the conditions as required by this Act, and require it to fulfill them if they are found not to have been fulfilled.
e) To issue necessary instructions to licensed institutions on matters concerning international financial transactions.
f) To acquire the services of local or foreign experts and specialist agencies for the promotion and development of international financial transactions.
g) To comply with the instructions issued by The Promotion Board from time to time.
h) To suspend or cancel, according to the situation, the license obtained by a licensed institution in case it violates this Act or the rules framed hereunder, or other current laws relating to international financial transactions.
   Provided that the concerned institution shall be provided with an opportunity to submit its explanations before canceling its license in that manner.
i) To perform such other Acts as are prescribed in order to make international financial transactions effective.

   Besides the above, 'Implementation Committee' also has the following functions, duties and powers as provided under the various sections of the Act.

   a) Under Sec. 11(2) The Implementation Committee may invite any local or foreign expert or advisor engaged in international financial transactions to attend its meeting in the capacity of an observer.
   b) Under Sec.14: License to be issued.

      The Implementation Committee shall, if it deems it appropriate to issue a license to conduct international financial transactions following necessary investigations into an application filled for a license to conduct financial transactions under section 13, issue a license in the prescribed form by prescribing necessary conditions also on payment of the prescribed license fee. In case a license cannot be issued the concerned applicant must be notified accordingly. The Implementation Committee shall have the power to demand information particulars or documents pursuant to the license application -section 15.

c) Under Sec. 17: Secrecy to be maintained

(1)The Implementation Committee must keep secret all documents and information relating to licensed institutions that are under its' custody or control.

(2)The Implementation Committee shall not be compelled to submit the documents and information mentioned in sub- section (1) to any Court, Inquiry Commission or Committee or the Commission for Investigation into Abuse of Authority, or to violate the secrecy of such documents or information in any way.

d) Under Sec. 18: Money to be deposited in The Consolidated Fund

Fees and other amounts received by the Implementation Committee under this Act shall be deposited in The Consolidated Fund.

e) Under Sec 19: Power to form Sub- Committee

(i) The Promotion Board or the Implementation Committee may form Sub Committees according to need in order to discharge their functions.

(ii) The functions, duties, jurisdiction and working procedures of a Sub- Committee formed under sub-section (1) shall be as prescribed by The Promotion Board or the Implementation Committee, which has formed it.

f) Under Sec.20: Cooperation to be provided:

All government agencies must extend necessary cooperation to The Promotion Board and the Implementation Committee in discharging their functions.

g) Under Sec. 21: Delegation of powers:

i. The Promotion Board may delegate all or any of the powers in it under this Act or the rules or by-rules framed hereunder to any of its member, or to the Implementation Committee, according to need.

ii. The Implementation Committee may delegate all or any of the powers vested in it under this Act or the rules or by- rules framed hereunder to any of its member, Sub-Committee or office-employee according to need.

Provided that the Implementation Committee may not delegate the power to issue licenses to conduct international financial transactions as well as the power to cancel or suspend such license.

Question No. 12:

International Financial Transactions Promotion Board.

[December, 2010](5 Marks) [June, 2007](5 Marks)

Answer:

As per section 9(1) of International Financial Transaction Act 2054, an international Financial Transactions Promotion Board comprises of 7 members including the chairman. Following are the members of such board:

i. Minister/State Minister for Finance Chairman

ii. Vice Chairman, National Planning Commission Member
iii. Governor, Nepal Rastra Bank Member
iv. Secretary, Ministry of Finance Member
v. Secretary, Ministry of Law and Justice Member
vi. A person nominated by Government of Nepal from among persons who has gained experience in financial transactions Member

The Promotion Board may invite national or foreign experts or advisors involved in international financial transactions to participate at its meeting as observers.
The tenure of office of the member nominated under Clause (g) of Sub-section (1) shall be two years.
An officer-level employee of Nepal Rastra Bank designated by the Promotion Board with the consent of the Nepal Rastra Bank shall act as the Secretary of the Promotion Board.
The working procedures of the meetings of the Promotion Board shall be as prescribed.
The members of the Promotion Board shall be entitled to receive such allowances and benefits as may be prescribed.

Question No. 13:
The Revenue Investigation Commission has directed the Implementation Committee to submit certain documents pertaining to Fraudulent Hedge Funds Ltd.", an international financial institution licensed by the implementation committee.
Is the Committee obliged to furnish the information to the commission?

[December, 2005](5 Marks)

Answer:
Sub-section 2 of section 17 of the International Financial Transactions Act, 1998 provides that the Implementation Committee shall not be compelled to submit documents and information relating to a licensed institution to any court, enquiry commission or committee or to the commission for Investigation of Abuse of Authority, or to breach the secrecy of such documents and information in any manner.
Hence the implementation committee is not bound to submit the documents/information to the CIAA.
However, if sufficient evidence exists to substantiate that such documents and information pertain to the licensed institution's transactions in contraband narcotics or arms, a court order may be obtained for the submission of the documents and information.

Question No. 14:
Crooked Hedge Funds Ltd., an international financial institution, having taken a license from the appropriate authority, wishes to do the following:

i. Buy 10,000 Himalayan Bank Bond, 2066
ii. Open an account with New Road branch of Himalayan Bank Ltd. Guide the Fund's resident representative.

[December, 2004](5 Marks)

Answer:

Clause (c) of section 5 of the International Financial Transactions Act, 1998 prohibits an International Financial Institution from purchasing shares or debentures of any Company established in the kingdom of Nepal. Thus Crooked Hedge funds Ltd. cannot buy Himalayan Bank Ltd. Bonds, 2066.

Clause (d) of section 5 restricts an International Financial Institution to open accounts with commercial banks of the kingdom of Nepal. However, provision to the clause states that an International Financial Institution may, with the approval of the Implementation committee, open an account in any commercial bank with an amount not exceeding the amount approved by the committee, in order to carry out its routine administrative functions. Hence, Crooked Hedge Funds Ltd. may open account with the New Road Branch of Himalayan Bank Ltd. after securing approval of the Implementation Committee.

Question No. 15:

Jackson Inc., an international trading house of USA, wants to obtain a license to conduct international financial transaction under the International Financial Transaction Act, 1998. Mr. Jackson, Director of the company wants to know, whether:

i. His company is allowed to open accounts in the commercial banks of Nepal or not?
ii. Is there any restriction on bringing in foreign exchange? Suggest Mr. Jackson in this issue.

[June, 2004](3+2=5 Marks)

Answer:

i. Section 5 (d) of the International Financial Transaction Act, 1998, prohibits the opening of account in any commercial bank of the kingdom of Nepal, but with the approval of the implementation committee, Jackson Inc. may open an account in any commercial bank with an amount not exceeding the limit prescribed by the implementation committee in order to carry out its routine administrative functions.

ii. Section 6 of the International Financial Transaction Act, 1998, provides no any restrictions on bringing foreign exchange:

- No restrictions of any kind shall be imposed on a licensed institution to bring in foreign exchange needed for conducting international financial transactions.
- No restrictions imposed by current laws relating to foreign exchange shall be applicable in respect to a licensed institution.

Question No. 16:

Videshi Limited, a non-Nepalese enterprise wishes to take a license under the International Financial Transaction Act, 2054. What basic criteria does it need to fulfill?

[December, 2003](5 Marks)

Answer:

As per section 4(1), only the following financial entities may be authorized to obtain licenses to carry out international financial transactions under this Act:

a) Foreign bank and trust companies,
b) International insurance and reinsurance companies,
c) Companies serving as the registered offices for foreign companies,
d) International holding and investment companies,
e) Administrative or regional offices established by foreign companies,
f) International trading companies,
g) International finance companies,
h) Foreign real estate holding companies,
i) Foreign Patent and royalty companies,
j) Foreign mutual funds,
k) International leasing companies,
l) International merchant banks,
m) Entities such as foreign partnership and trusts established as body corporate,
n) International sales transaction companies,
o) Foreign entities to allow nonresident pensions or deferred bonus plans,
p) International financial companies providing services like stock broker, underwriter, investment advisor, pension fund advisor.

Notwithstanding anything contained in Sub-section (1), in order to obtain a license under this Act, a financial entity should have been registered duly in any country outside the Nepal and engaged in international financial transactions at least for a period of three years. Government of Nepal may, on the recommendation of the Promotion Board, and by notification published in the Nepal Gazette, make alterations, additions or deletion to the list of financial entities as referred to in Sub-section (1).

Question No. 17:

Mention the provision regarding repatriation of funds by a licensed institution.

[December, 2003](5 Marks)

Answer:

A licensed institution, according to section 7 of the Act, may repatriate foreign exchange earned by it from international financial transactions and the foreign exchange brought by it for

conducting such transactions. However, foreign exchange earned through any illegal or unauthorized transaction will not be allowed to be repatriated outside the kingdom of Nepal.

CHAPTER-11

COOPERATIVES ACT, 2074 AND REGULATION 2075

[Note: All answers suggested hereby have been updated as per Cooperative Act, 2074 and its Rules, 2075]

Question No. 1 :

Co-operative is a kind of institution where various sectors of local people are integrated by mobilizing the scattered capital and skill of the members thereof to carryout out community based economic social and cultural activities for the development of national economy. State the exemptions and facilities which are provided to the cooperative societies under the Co-operative Act, 2074? **(December 2022) (7 Marks)**

Answer:

Section 78 of the Cooperative Act, 2074 prescribes the provision regarding exemption and facilities to cooperative societies. Notwithstanding anything in the Act, Cooperative Society will be entitled to the following exemptions and facilities under the Section 78 of the Act:

i) As per S.78(1) Notwithstanding anything contained in the prevailing law, the Cooperative Society/Association will be entitled to the following exemptions and facilities:
   - The cooperative/Association or society shall not be required to have registration pass of any instrument relating to its transaction, other than an instrument relating to immovable property.
   - No revenue and stamp fee shall be charged on a document or any kind of instrument related with the purchase of an immovable property in respect of construction of its building.

   However the revenue fee shall be charged on a document or any kind of instrument purchased while carried out its business.

   Accordingly, where immovable properties purchased with exemptions of revenue are disposed without being used shall have to return such exempted revenue charge use to be levied.

ii) No revenue and stamp fee shall be charged on a document or any kind of instrument related to the registration of pledge of or going to pledge by it. Notwithstanding anything contained in the prevailing law, no local tax shall be levied on the reserved fund created by the Cooperative Society as per the Section 68, capital refund protection fund created by the cooperative society as per Section 69 and cooperative promotional fund created by the society as per Section 70 of the Act.

iii) The government of Nepal may, by notification in the Nepal Gazette and pursuant to the prevailing law, exempt fully or partly from chargeable customs tariff or sales tax such machineries, industrial and agro-machines, equipment, spare parts, raw materials, office equipments and means of transport as are imported by an association or society for its use.

iv) The government of Nepal may, by notification in the Nepal Gazette and pursuant to the prevailing law, exempt fully or partly from chargeable excise duty or value added tax the goods produced by any association or society.

v) The government of Nepal may, by notification in the Nepal Gazette and pursuant to the prevailing law, exempt the chargeable export duty the goods produced by any association or society and grant the cash as other industries are entitled to pursuant to the law.

vi) An association or society doing industrial business carrying basic industrial promotional business or some special industry shall also be entitled to such other exemptions, facilities and protection as the industries are entitled to pursuant to the law, in addition to the exemptions mentioned as above.

vii) Government of Nepal, Provincial Government or Local level government organization may grant exemption of any tax fully or partly along with the privileged loan and other financial assistance and facilities, to the backward rural woman, differently able person, bonded labour, landless farmers, unemployed persons, self-employed promotional industries and for the development of the labour and skill of self-employed industries.

viii) Government of Nepal, may revenue exemption to the seek industries intended to be operated by the workers themselves and provide financial provide financial assistance, or transfer of such industries or grant guarantee to such industries.

ix) The government of Nepal may, by notification in the Nepal Gazette and pursuant to the prevailing law, grant financial facilities or exemption of excise duty value added tax levied on the goods produced by the special rural cooperative, market place, with a view to develop big cooperative scheme by making participation in professional share, construction of basic infrastructure or acquiring land for such infrastructure.

The process of acquiring exemption, facilities and privileges under the provision of the Act shall be as prescribed.

Question No. 2:

Parbat Cooperative Organization has recently been established in Phalebas. Discuss its statutory functions as specified in Co-operatives Act, 2074. **(June 2022) (5 Marks)**

Answer:

Functions of Cooperative Organization or Association are provided under section 25 of the Cooperatives Act, 2074 as under: The Cooperative Organization or Association shall carry out the following functions:-

a. To comply with or cause to be complied with the values, norms and principles of cooperatives;

b. To promote interests of members and its own and to carry out or cause to be carried out their marketing;
c. To provide education, training and information to members and to promote or cause to be promoted good governance in Organization or Association;
d. To promote or cause to be promoted mutual cooperation between Organizations and Associations;
e. To determine standards of the products and services of the Organization or Association and to carry out functions as to quality reform, economic stability and risks management;
f. To submit internal control system;
g. To operate activities relating to commercial promotion and development of Organization or Association;
h. To comply with the directives of the Ministry, Registrar, Province, local level or office;
i. To carry out functions referred to in the Byelaws.

Question No. 3:
Manoj is elected and appointed as a Convener of Accounts Supervision Committee of Birat Cooperatives Bank and asked you what functions, duties and powers this Committee will perform, discharge and exercise under the Cooperatives Act, 2074? Further, state the purpose of the formation of the Account Supervision Committee. **(December 2021) (6 Marks)**

Answer:

Section 48 of the Cooperatives Act, 2074 provides the purpose and formation of Accounts Supervision Committee as under:

(1) In order to strengthen the internal control system in a Cooperative Organization, the General Meeting shall form through election an Accounts Supervision Committee comprising of one convener and two members having met the prescribed qualifications.

(2) More than one member of the same family shall not stand as candidate or get elected in the same tenure as a director or convener or member of the Accounts Supervision Committee of the same Cooperative Organization.

Section 49 of this Act prescribes the following functions, duties and powers to that Accounts Supervision Committee:

a) To conduct or cause to be conducted internal auditing of the Cooperative Organization in every quarter;

b) To comply with or cause to be complied with the basic principles of auditing while conducting internal auditing;

c) To inspect and evaluate and cause to be inspected or evaluated financial transactions;

d) To have regular supervision of the actions and activities of the Board and to provide necessary suggestions to the Board;

e) To monitor whether or not directives issued or decisions made by the General Meeting and decision of the Board have been implemented;

f) To submit to the General Meeting accounts report and annual report on supervision of the functions of the Board;

g) To recommend the Board to call meeting of the extraordinary General Meeting showing the reasons thereof that adverse impact is caused in the interests of any Cooperative Organization due to non-compliance of the recommendations made by it frequently; that there have been embezzlement or massive misuse of cash or kind assets of such organization or in case the organization is likely to undergo serious financial crises.

h) To make recommendation of names of three persons to be appointed as internal auditor, if required.

The convener and members of the Accounts Supervision Committee shall not be involved in daily and administrative functions of the Cooperative Organization.

Question No.4 :

Explicitly mention the objectives and functions of Cooperative Organization or Association formed and operated under the Cooperatives Act, 2074.

(Dec, 2020) (5 marks)

Answer:

Section 24 of the Cooperatives Act, 2017 provides the objectives of the Cooperative Organization or Association. The main objective of a Cooperative Organization or Association shall be to attain economic, social and cultural prosperity based on working areas and on being concentrated on its members.

Section 25 of this Act deals with the functions of Cooperative Organization or Association as under:

a) To comply with or cause to be complied with the values, norms and principles of cooperatives;

b) To promote interests of members and its own and to carry out or cause to be carried out their marketing;

c) To provide education, training and information to members and to promote or cause to be promoted good governance in Organization or Association;
d) To promote or cause to be promoted mutual cooperation between Organization and Association;
e) To determine standards of the products and services of the Organization or Association and to carry out functions as to quality reform, economic stability and risks management;
f) To submit internal control system;
g) To operate activities relating to commercial promotion and development of Organization or Association;
h) To comply with the directives of the Ministry, Registrar, Province, local level or office;
i) To carry out functions referred to in the Byelaws.

Question No. 5:

Cooperative Association has right to collect deposit and carryout credit transaction with accompanying more than one hundred Nepalese citizen altogether as provided in the section 3 of Cooperatives Act, 2074. Cooperative Bank can also incorporate with motive of carrying credit transaction as set forth in the same Act. So, this Act also defined some act as an offence and provided punishment. State the acts deemed to be an offence under the Cooperatives Act, 2074.

[June 2019](6 Marks)

Answer:

Obviously, cooperative association has power to collect deposit and carryout credit transaction within member and association. The following acts are prohibited and finally declared as to be an offence under chapter 19 of Cooperative Act, 2074:

a) To provide credit without taking a guarantee or collateral while providing loan amount more than prescribed limit,
b) To embezzle amount of credit that is provided to any member of committee, relatives thereof or other person or an employee that is resembles that the credit amount may not to be recovered
c) To take amount of credit with providing fraud or fake descriptions, collateral is proved immature or embezzle the credit amount.
d) The cooperative association has been carrying out the invest of amount or collecting any amount with an objective of invest in any manner contrary to this Act and rules or by rules framed under this Act.
e) To provide or cause to be provided any credit with placing the artificial enterprise or cause to placed thereof.
f) To provide or cause to be provided the credit amount carrying out the higher valuation of collateral in the unrealistic manner.
g) To provide or cause to be provided the credit amount on the basis of fraud statement and adding more cost of project in the unrealistic manner.

h) To provide or cause to be provided the credit amount in the manner that the collateral that is provided to any person or cooperative association once is not released with due process or such collateral has been provided in other institution in the manner of higher valuation than that of the value which the collateral has.
i) To use or caused to be use the credit amount in the manner that the credit is provided for any certain purpose by a cooperative association but the credit amount is used in the area of vice versa.

Question No. 6:

Cooperative Association has right to collect deposit and carryout credit transaction with accompanying more than one hundred Nepalese citizen altogether as provided in the section 3 of Cooperatives Act, 2074. Cooperative Bank can also incorporate with motive of carrying credit transaction as set forth in the same Act. So, this Act also defined some act as an offence and provided punishment. State the acts deemed to be an offence under the Cooperatives Act, 2074.

[June, 2019](6 Marks)

Answer:

Obviously, cooperative association has power to collect deposit and carryout credit transaction within member and association. The following acts are prohibited and finally declared as to be an offence:

a) To provide credit without taking a guarantee or collateral while providing loan amount more than prescribed limit,
b) To embezzle amount of credit that is provided to any member of committee, relatives thereof or other person or an employee that is resembles that the credit amount may not to be recovered.
c) To take amount of credit with providing fraud or fake descriptions, collateral is proved immature or embezzle the credit amount.
d) The cooperative association has been carrying out the invest of amount or collecting any amount with an objective of invest in any manner contrary to this Act and rules or by rules framed under this Act.
e) To provide or cause to be provided any credit with placing the artificial enterprise or cause to placed thereof.
f) To provide or cause to be provided the credit amount carrying out the higher valuation of collateral in the unrealistic manner.
g) To provide or cause to be provided the credit amount on the basis of fraud statement and adding more cost of project in the unrealistic manner.
h) To provide or cause to be provided the credit amount in the manner that the collateral that is provided to any person or cooperative association once is not released with due process or such collateral has been provided in other institution in the manner of higher valuation than that of the value which the collateral has.

i) To use or caused to be use the credit amount in the manner that the credit is provided for any certain purpose by a cooperative association but the credit amount is used in the area of vice versa.

Question No. 7:

Rural Multiple Cooperative is in operation. It has completed its audit also. The audit report shows that this Cooperative is in problematic situation. The Management Committee of the Cooperative reassured to the concerned authority that the Cooperative shall be operated within its objectives and the prevailing legal regime. But, the concerned authority decided to go with the corrective actions against the Cooperative. State the corrective actions as mentioned in the Cooperatives Act, 2074.

[December, 2018](5 Marks)

Answer:

The Rural Multiple Cooperatives has made its audit and the cooperative is taken corrective action due to its audit report. The management committee, may, pursuant to section 114 of the Cooperatives Act, 2074, take the following corrective actions against the Cooperative association.

a) To order the Board of Directors to operate the management or perform functions, and transact business of Cooperative.
b) To cause to operate the management or perform functions and transact business to interim committee by constituting it from amongst the shareholders of the concerned Association or Society.
c) To constitute or cause to constitute a new BoD from the AGM, after dissolving the previous BOD in order to operate the management or carry out the functions and transact business of the Association or Society.
d) To render the responsibility, to Central Sectoral Cooperatives Association or National Cooperatives confederation, in which concerned Association or Society has membership in such body by prescribing specific terms and conditions, if such body is desirous to take responsibility to reoperate the problematic cooperatives Association or Society through submitting its reliable action plan.
e) To adopt other reformative or corrective measures as the Management Committee deems it fit.

Question No. 8 :

Exemptions and Facilities to Cooperative Societies.

[December, 2010](5 Marks) [June, 2018](5 Marks) [June, 2015](5 Marks)

Answer:

Section 78 of Cooperative Act, 2074 prescribes about exemptions and facilities to cooperatives as follows:

1. Notwithstanding anything contained in the prevailing law, the Cooperative Societies shall be entitled to the following exemptions and facilities:
   (a) The Cooperative/Association or society shall not be required to have registration pass of any instrument relating to its transaction, other than an instrument relating to immovable property.
   (b) No revenue stamp fee or registration fee shall be charged while purchasing immovable properties including land by cooperative societies for the construction of own building and service center.
   Provided that
   (1) Revenue stamp fee or registration fee shall be charged while purchasing immovable properties including land by cooperative societies for the commercial purpose.
   (2) If the movable properties including land purchased after obtaining exemption of registration fee is sold without being used, registration fee exempted for such purpose shall be returned.
   (c) No charges shall be levied while passing the registration to withhold the pledged collateral received by the cooperative as security against disbursed loan or as guarantee
2. Notwithstanding anything contained in the prevailing law, income tax shall not be levied upon amount appropriated to general reserve fund under clause (a) of subsection (2) of section 68, amount appropriated to capital redemption reserve fund under subsection (2) of section 69 and amount deposited to cooperative promotion fund under subsection (2) of section 70 by the cooperative.
   Provided that tax liabilities of member related to the amount received by members from capital redemption reserve shall be as prescribed in prevailing laws.
3. The Government of Nepal may, by a notification in the Nepal Gazette and pursuant to the prevailing law, exempt fully or partly from chargeable customs tariff or sales tax such machineries, industrial and agro-machines, equipment, spare parts, raw materials, office equipment and means of transport as are imported by cooperative societies.
4. The Government of Nepal may, by a notification in the Nepal Gazette and pursuant to the prevailing law, exempt fully or partly from chargeable excise duty or value added tax at the goods produced by cooperative societies.
5. The Government of Nepal may, by a notification in the Nepal Gazette, exempt export duty while exporting the goods produced and pay export cash grant as the industries are entitled to pursuant to the prevailing law.
6. Cooperative society doing industrial business shall also be entitled to such other exemptions, facilities and protection as the industries are entitled to pursuant to the prevailing law, in addition to the exemptions mentioned in this section and cooperative societies constructing and operating physical infrastructure or operating special industry, shall also be entitled for exemption, facilities and preservation received by enterprise or service pursuant to prevailing law.

7. The Government of Nepal, Province Government or local bodies may provide full or partial exemption of any tax as per prevailing law, seed capital, cost participation grant, special financial facilities including concessional loan and technical support for the motivation of cooperative farming or labour or skill based self-employed industries of deprived rural females, disable persons, mukta Kamaiya, mukta Haliya, landless farmers, unemployed, workers and dalit and marginalized communities including minorities indigenous
8. The Government of Nepal may, referring the nature of industry, provide tax exemption, guarantee or appropriate assistance as motivation while transferring ownership or at transfer of private ownership if workers desire to re-operate the sick public or private industry at own ownership through cooperativeness by maintaining reasonable proportion of seed capital, grant, loan or concessional loan.
9. The Government of Nepal may, by a notification in the Nepal Gazette, provide cooperative gram operating in the format of specialized association, share participation to large cooperative business projects including market place, land or land acquisition for infrastructure construction and amount payment as compensation, exempt fully or partly from chargeable excise duty or value added tax at the goods produced by cooperative societies.
10. Process pursuant to receipt of exemption, facilities and concessions pursuant to this section shall be as prescribed.

Question No. 9:

What are the functions and duties of Registrar under Cooperative Act/Rules of Nepal? Explain

[December, 2017](5 Marks)

Answer:

Section 92 of Cooperative Act, 2074 has given the power to the Ministry of Land Management, Cooperatives and Poverty Alleviation for designating any gazetted first class officer of civil service to work as the registrar.

Rule 76(1) of Cooperative Rules 2075 prescribes about the functions, duties and power of registrar as follows:

a) To register cooperative societies after conducting necessary investigations into applications received and issue certificates of registration.
b) To approve the bye-rules framed by cooperative societies for operating their business subject to the Act and this Rules.
c) To operate activities relating to amalgamate, division and jurisdiction re operation subject to the Act and this Rules.
d) To conduct inspection and examine accounts of cooperative societies regularly and provide necessary direction by monitoring cooperative societies regularly on the basis of established information report system
e) To monitor the audit of cooperative societies regularly and cause to audit of cooperative societies which fail to audit within the prescribed period

f) To formulate plan and program for the promotion of cooperative farming or member labour or skill based self-employment industries of deprived rural females, disable persons, mukta kamaiya, mukta haliya, landless, unemployed, workers & dalit and minorities indigenous including marginalized group.
g) To assist for cooperative business, price series development of agricultural products and its related inter cooperative transactions
h) To coordinate for formulation, operation and expansion activities of cooperative education and training functions
i) To provide necessary direction for the development of cooperative societies, practice of cooperative principles, norms and maintaining good governance at cooperative societies
j) To penalize and impose other punishment as per the provision mentioned in the Cooperative Act if any cooperative societies do not work in compliance with Act, directives, standards, procedures framed under this Rules and bye rules.
k) To submit annual inspection report of cooperative societies to the ministry within three months after expiry of each fiscal year
l) To conduct necessary activities for operating the cooperative societies at inactive status.
m) To grant permission for the operation of service centre, collection center and sales center fixing necessary standard
n) To operate other activities as prescribed by Act, this Rules and Directives, Standards, Procedures made under it Directions received from the Ministry.

As per rule 7(2), the registrar may, out of powers obtained as per the Act and this Rules, delegate few powers to officers under it as per necessity.

Question No. 10:

Cooperatives established under the Cooperatives Act, 2048 are authorized to make financial activities. How do you see this provision of this Act? Is there any scope for reform in this Act? Give your argument.

[June, 2017](5 Marks)

Answer:

Section 12 and Chapter 8 of Cooperative Act, 2074 prescribes about the constitution of Cooperative Bank and operation of its banking transactions as follows:

As per section 12 of the Act, associations or societies may jointly constitute a cooperative bank with the objective of accepting deposit of societies or associations, issuing loan to such societies or associations or making available banking services to such societies or associations taking prior approval of Nepal Rastra Bank.

If an application, accompanied by a recommendation of the Nepal Rastra Bank, is made for the establishment of a cooperative bank pursuant to Cooperative Act, 2074, the Registrar may hold necessary inquiry and register such bank. A bank registered and established pursuant this Act may carry on the banking transactions prescribed under section 54 of the Act among its member

societies or associations subject to this Act, Rules formulated under this Act, Biniyam and other prevailing laws.

However, the cooperative bank is not entitled to disburse loan against the collateral or guarantee of own loan. Further, the bank has to observe the terms and conditions prescribed by and the directions given from time to time by the Nepal Rastra Bank.

There is the scope for reform in the governance of the cooperative societies and Associations for the best interest of their members and the national economy. Let the cooperative societies/association be run transparently, effectively, prudently and efficiently for which the government must create favorable business environment for these cooperative entities.

Question No. 11:

How is the board of directors of a cooperative society formed? In case the board is not formed on time, what role the Registrar may play? How a member of the board may be expelled?

[June, 2016](2+1.5+1.5=5 Marks)

Answer:

As per Section 16 of Cooperative Act, 2048, every association or society shall have one board of directors, and the formation, functions, duties and powers of the board shall be as provided in the bye-law of the concerned association or society. It further states that the board has to get a new board elected prior to the expiration of its tenure of 5 years.

If the board does not hold election on time, any member may give information thereof to the Registrar, who, irrespective of whether information as referred to above is received or not, shall hold election of the board within six months after the expiration of the tenure of the board.

A member of the board may be expelled by the general assembly through a resolution to that effect passed by a majority upon presentation of an agenda by the five present of the members.

Question No. 12:

Dissolution of a Cooperative Society

[December, 2014](5 Marks)

Answer:

Dissolution and cancellation of registration of cooperative society have been provided under section 88 of the Cooperatives Act, 2074 as under:

As per section 88(1) of Cooperative Act 2074, a majority of the total number of members of the general meeting of a cooperative society may decide to liquidate the cooperative society under following conditions and apply for approval by board to the Registrar or officer authorized by the Registrar.

a) If it is impossible to attain objective and activities prescribed at its bye rule

b) If incapable to benefit the member

On receipt of an application accompanied by the decision as referred to in Sub-section (1) above, the Registrar or officer authorized by him/her may cancel the registration of such cooperative society [u/s 88(2)].

While cancelling the registration, the Registrar or the officer authorized by the Registrar shall provide at least fifteen days period for hearing [u/s 88(4)].

In the event of such cancellation of registration, such cooperative society shall be dissolved [u/s 88(5)].

Question No. 13:

The Registrar of cooperative has desired to review the work of liquidator of Jwagal Cooperative Ltd. saying the work of liquidator is not satisfactory as the liquidator of Jwagal cooperative has violated the directions and orders of the Registrar. Can the Registrar review the work of liquidators? If so, how can he/she control the liquidator on liquidation process?

[December, 2013](7 Marks)

Answer:

As per rule 59(1) of Rules 2075, the registrar may appoint any officer employee under it as liquidator at society having property upto fifty lakh.

As per rule 59(2) of Cooperative Rules 2075, the registrar may provide necessary direction at liquidation related work to the liquidator appointed by the registrar under rule 59(2).

Rule 61 of the Cooperative Rules, 2075 has defined the power of the Registrar to control on the liquidation process as follows:

a) To cancel, amend the order issued by the liquidator against the direction or as per necessity make next order
b) To make submit records, documents, written and properties of society or association
c) To prescribe limitation in the right of liquidator prescribed under rule 60,
d) To obtain report of accounts examined by liquidator,
e) To conclude compromise letter under clause (e) of rule 60 and to determine general principle regarding the distribution of property under clause (j) of that rule
f) To provide necessary direction for remuneration and allowance to be received by liquidator
g) To remove the liquidator from the post and appoint another liquidator

Question No. 14:

Sani applied to Karkase VDC for their recommendation to acquire a membership of an association named Jwala Cooperative having registered office in the Karkase VDC. Advise Sani about the procedure and also tell her by when she gets membership of Jwala Cooperative.

[June, 2013](5 Marks)

Answer:

Section 30 of Cooperative Act 2074 states that following Nepali citizens attaining 16 years of age are eligible to become member of the cooperative:

h) Persons who reside within the jurisdiction of the cooperative,
i) Subscribed at least one share of the cooperative
j) Undertaken to bear term and condition prescribed in the bye rule of the cooperative,
k) Undertaken to bear responsibilities of the cooperative,
l) Not transacting the business competitive to the cooperative.

As per section 31 of Cooperative Act 2074, membership of an association shall be subject to approval of the Board of the cooperative. In other words, the Act does not require recommendation for the VDC to a person who intends to become a member of a cooperative. A person who intends to become a member of a cooperative has to make an application to its board. The, the board has to make decision for providing or not providing the membership subject to this Act, Rules framed under this Act and Bye rule within 35 days of making such application. In the event of refusal by the board to provide membership, the applicant shall be notified within 7 days. The concerned person may make a petition to the Officer authorized by the Registrar against the cooperative within 30 days of notice received.

Hence, in the given case, Sani need not obtain the recommendation of Karkase VDC. Instead, she can directly apply to the Board and in case of refusal by the board she can make petition to the Officer authorized by the Registrar.

Question No. 15:

Powers of cooperative to carry on banking transactions.

[Final/December, 2012](5 Marks) [December, 2011](5 Marks) [Final/December, 2012](5 Marks) [June, 2011](5 Marks) [Final/December, 2012](5 Marks)

Answer:

Section 12 and Chapter 8 of Cooperative Act, 2074 prescribes about the constitution of Cooperative Bank and operation of its banking transactions as follows:

As per section 12 of the Act, associations or societies may jointly constitute a cooperative bank with the objective of accepting deposit of societies or associations, issuing loan to such societies or associations or making available banking services to such societies or associations taking prior approval of Nepal Rastra Bank.

If an application, accompanied by a recommendation of the Nepal Rastra Bank, is made for the establishment of a cooperative bank pursuant to Cooperative Act, 2074, the Registrar may hold necessary inquiry and register such bank. A bank registered and established pursuant this Act may

carry on the banking transactions prescribed under section 54 of the Act among its member societies or associations subject to this Act, Rules formulated under this Act, Biniyam and other prevailing laws.

However, the cooperative bank is not entitled to disburse loan against the collateral or guarantee of won loan. Further, the bank has to observe the terms and conditions prescribed by and the directions given from time to time by the Nepal Rastra Bank.

Question No. 16:
Expulsion of member of a board or dissolution of board under Cooperative Act

[December, 2012](5 Marks)

Answer:
As per section 44(b) of Cooperative Act 2074, any director may be removed under section 4(1) of the Act.

1) As per section 45(1) of the Act, any director may be removed from the post of board of director in any of the following condition:
   a) Caused loss to the concerned cooperative by committing financial embezzlement
   b) Breached the confidentiality regarding transactions of concerned cooperative without authority
   c) Committed any action causing disadvantage to the concerned cooperative
   d) S/he became incapable to work physically or mentally
   e) If any director lacks qualification prescribed in this Ac, Rules framed under this Act or bye-rule
2) As per section 45(2) of the Act, before removing any director, opportunity to present clarification shall be given to such director at general meeting.
3) As per section 45(3) of the Act, if any director does not present clarification within the period mentioned under subsection (2) or the clarification presented is not satisfactory, general meeting may remove such director from the post.
4) Member removed the post of director shall not be entitled to file candidacy of director for two tenures of board.
5) If any director is removed pursuant to sub section (3), the general meeting shall hold election of next director in such post for remaining tenure.

Question No. 17:
What is the process of auction sale of properties by co-operative societies?

[Final/June, 2012](5 Marks) [June, 2010](5 Marks)

Answer:
Rule 30 of Cooperative Rules, 2075 prescribes about the auction of properties as follows:

b) A summon shall be issued to the borrower who has not paid the arrears amount for making the repayment or if he has already repaid it, for furnishing its evidence within 35 days excluding the travel period.
c) At issuance of summon pursuant to clause (a), if he does not come to repay or does not furnish already paid evidences, auction notice shall be published of the concern's name.
d) If the pledged building, land has not been withhold at land revenue office, make it to withhold and keep its evidence
e) the concerned office too withhold any property which it has taken up as collateral security against a credit pursuant to this rule in the name of the cooperative so that such property may not be registered in name of, or transferred to, any person.
f) Notice regarding arrears amount, interest and principal, compensation and all the details of the auction must be published in the local or national daily newspapers.
g) The auction should be started when the office opens and be ended one hour before the office closes. If the date of auction happens to be a holiday then the date of auction will be on the next day.
h) The auction is started from the reserve price and the higher bidder is eligible to get the auctioned property.
i) Even if the person is not present in the auction, the auction will not be discontinued.
j) Under Rule 31, the auction sales can be postponed if it deems necessary to postpone the sales.

Question No. 18:

How a cooperative society arrange financial sources and mobilize them?

[Final/December, 2011](5 Marks)

Answer:

Co-operative Act 2074 is made to provide legal provisions for the Cooperative Associations and Societies. Preamble of the Act prescribes expedient of the Act to make provisions on the formation and operation of cooperativeness for the economic and social development of the general public.

Chapter-7 of the Act prescribes the provision regarding deposit and credit operation. Under Section 50 of the Act, the cooperative may accept deposit only from its members, mobilize it and lend it to its members only.

Another mode of collection of financial source has been made by sale of shares pursuant to chapter 9 of the Act. As per section 63 of the Act, an association or society may collect share capital by selling its shares to those persons who are under its jurisdiction and are eligible to become member of it. As per section 63(2) of the Co-operative Act, 2074, a cooperative society is not entitled to sell shares exceeding 20% of its total share capital to any single member except the institution or entity fully or partially owned or controlled by the Government of Nepal.

As per section 136 of the Act, irrespective of capital subscription, every member is entitle to use voting right on the basis of one person one vote. So, the allotment of voting right proportionate to the shares bought is incorrect and all shareholders will carry one vote each.

The Society has power to issue debentures and borrow loans: An association or society may issue debentures and borrow loans from a native or foreign bank or other body.
Provided that, approval of Government of Nepal has to be obtained prior to issuing debentures or borrowing loans.
Security of Government of Nepal may be obtained while borrowing loans: If an association or society intends to obtain the security of Government of Nepal against debentures to be issued by the association or society or loans borrowed from a foreign bank or other body, the association or society has to make an application to Government of Nepal for the same. If Government of Nepal, upon consideration of an application made as stated above thinks appropriate, it may provide security against such debentures or loans. In providing such security, Government of Nepal may prescribe necessary terms and restrictions in respect of repayment of such debentures or loans; and the association or society has to make repayment accordingly.
Section 26 of the Act prescribes powers to carry on banking transactions. According to it, an association or society may accept saving deposits from its member and lend loans to its members. An association or society has to obtain prior approval of the Nepal Rastra Bank in order to carry on other banking transactions including acceptance of deposits and disbursement of loans limited only to its members, other than the debentures or loans subject to those terms and restrictions.
Notwithstanding anything contained elsewhere in this Act, associations or societies may jointly form a cooperative bank pursuant to section 12 of the Act.
If an application, accompanied by a recommendation of the Nepal Rastra Bank is made for the establishment of a bank as said above Registrar may hold necessary inquiry and register such bank. A bank so registered and established may carry on the banking transactions under the approval of the Nepal Rastra Bank; and the bank has to observe the terms and conditions prescribed by and the directions given from time to time by the Nepal Rastra Bank.

Question No. 19:
Cooperative Banks and Micro-Credit Institutions.

[Final/June, 2011](5 Marks)

Answer:
Cooperative banks are cooperative societies established under Cooperative Act 2074 and micro credit institutions are nonprofit motive organizations established under Association Registration Act, 2034. Both these institutions obtain license from Nepal Rastra Bank under BAFIA, 2073 and operate their financial transactions.
In addition to central, commercial, development banks and finance companies, there are other different financial institutions involved at present in different types of banking business: Cooperatives, micro-credit institutions (rural banks), non-governmental organization, etc. There are some rural banks promoted by the private sector working in the rural areas as micro-credit institutions. Under the Financial Intermediaries Institution Act, 1999 different non-governmental organizations (NGO) are also involved in the business of micro-credit in rural areas by the

permission of NRB. Basically, co-operatives with the objective of saving and credit services and other intermediary services, rural bank or micro-credit institutions and non-governmental organizations which are involved in the job of financial intermediaries receive class D license from NRB to be involved in the financial transaction.

In foreign countries, co-operative banks are highly recognized and being involved in almost all transactions which are allowed for other banking companies, but in our case co-operative banks are not that much recognized except to a Co-operative bank established under the provision of Co-operatives Act, 2074 The co-operatives, which are involved in the business of saving and lending are allowed to do this business only being limited within its members. The co-operatives which are intended to be involved in the banking business other than saving and lending need to obtain license from NRB. There are dozens of co-operatives which have obtained license from NRB for limited banking business having class D license under section 49 of the BAFIA, 2073.

These financial institutions having class D license can engage themselves in following financial activities as determined by sub-section (4) of section 47 of BAFIA.

Question No. 20:

Objectives and Organization of Cooperative Societies.

[Final/June, 2010](5 Marks)

Answer:

As per section 24 of Cooperative Act 2074, the main objective of cooperative societies shall be to attain economic, social and cultural prosperity of own members based on its jurisdiction and focused on its members.

Section 3 of the Cooperative Act, 2074 prescribes about the organization of cooperative societies as follows:

1) At least 30 Nepali citizens may jointly constitute a sectorial or multipurpose cooperative
2) Notwithstanding anything contained in sub section (1), cooperative society conducting business based on labor or skill of worker, youth, fifteen Nepali citizens may also constitute the society.
3) Notwithstanding anything contained in sub section (1), in case of constituting cooperative operating saving and credit transactions in metropolitan city and sub metropolitan city area, at least one hundred Nepali citizens shall participate in it.
4) While constituting a cooperative pursuant to this section, the number mentioned under sub section (1), (2) or (3) shall have attained at the rate of one family one member.

   Provided that no any restriction shall be imposed to become member by more than one persons of single family after the registration pursuant to section 15 of the Act.

   The Act also prescribes about the constitution of associations viz. District Sectorial Cooperative Association[u/s 5], District Cooperative Association[u/s 6], Province Sectorial Cooperative Association[u/s 7], Province Cooperative Association[u/s 8], Central Sectorial

Cooperative Association[u/s 9], Specialized Cooperative Association[u/s 10], National Cooperative Federation and Cooperative Bank [u/s 12]

Question No. 21:

How the cooperative societies can allocate their surplus in various funds?

[December, 2009](5 Marks) [December, 2005](5 Marks)

Answer:

As per clause (a) of subsection (2) of section 68 of Cooperative Act 2074, at least 25 percent of net saving (i.e. net profit) shall be appropriated to general reserve fund.

After appropriating the amount for general reserve fund under section 68(2)(a), at least 25 percent of residual amount shall be appropriated to capital redemption reserve fund pursuant to subsection (2) of section 69.

After appropriating the amount for general reserve fund under section 68(2)(a), at least 0.5 percent of residual amount shall be appropriated to cooperative promotion fund pursuant to subsection (2) of section 70.

Other than the fund prescribed under section 68, 69 & 70 of the Act, the other funds in the cooperative society shall be as prescribed.

As per rule 27 of Cooperative Rules 2075, after appropriating the amount for funds under section 68, 69 & 70 of the Act, at least five percent of the residual amount shall be distributed to following funds:

f) Cooperative Education Fund
g) Share Dividend Fund
h) Employee Bonus Fund
i) Cooperative Development Fund
j) Loss Recovery Fund
k) Community Development Fund
l) Stabilization Fund approved by the general meeting under sub section 5 of section 103
m) Other Risk Management Fund

While distributing the bonus amount under clause (c) of sub rule (1), the amount of bonus shall not be distributed exceeding more than 3 month salary.

Question No. 22:

Indrawati Cooperative Limited, which is registered under the Cooperative Act, 2048, conducts banking activities among its members. During the fiscal year 2064/65, the Cooperative mobilized deposits of Rs. 8 million and granted loans of Rs. 5 million. After providing for depreciation allowance of Rs. 0.2 million, it earned a total profit of Rs. 0.5 million. The Cooperative, however, did not make provision for possible loan losses although the internal audit department reported that one account had turned bad and thus required full provisioning. Is the profit calculated by the Cooperative correct in accordance with prevailing laws?

Would your answer be any different had the Cooperative been also licensed by the Nepal Rastra Bank?

[December, 2008](5 Marks)

Answer:

As per Section 43 of the Bank and Financial Institution Act 2073, every licensed financial institution is required to appropriate funds in the Loan Loss Provision at the rate prescribed by Nepal Rastra Bank. However in the given case, the cooperative is established under the Cooperative Act 2048 and hence it is not mandatory for it to make provision as to be made by other banks and financial institutions covered by the Nepal Rastra Bank's supervision. Hence, the profit derived by the cooperative without making loan loss provision is correct as per the applicable law.

However, if the cooperative had also been licensed as a cooperative bank by Nepal Rastra Bank, it is also considered as a licensed financial institution. In such a case, it is required to make provisions as prescribed by Nepal Rastra Bank, before arriving at the profit. Hence, the loan loss provision for outstanding loans will be calculated and deducted from the profit of Rs. 500,000 and revised profit will have to be derived.

Question No. 23:

Answer the following questions:

The Accountant of Dildaar Co-operative Society allotted the Society's surplus of Rs. 5,00,000 for the year 2059/60 as follows:

		Rs.
1.	Credit to Reserve Fund	1,00,000
2.	Dividend Distribution	2,00,000
3.	Co-operative Education Fund	1,00,000
4.	Loss Reimbursement Fund	1,00,000

The total share capital of the Society is Rs. 10,00,000.

i. Point out the errors committed by the accountant in the allotment of the Society's surplus and suggest rectification.

ii. The Board of Directors of Dildaar Co-operative Society approved a loan write-off of Rs. 1,50,000 with a 55% majority decision. Comment on the legality of the Board's act.

[June, 2007](5 Marks)

Answer:

i. As per section 68(2) of the Co-operative Act, 2074, at least one-fourth of its surplus should be allocated to Reserve fund. Hence, in the given case, appropriating Rs 1,00,000 only i.e. 20 percent of share capital is an error. Instead, it shall appropriate at least 25 percent i.e. Rs. 1,25,000 to reserve fund.

As per proviso clause to section 71(2), the amount of dividend in any year distributed to the shareholders share not exceed 18% of its share capital.

In the given case, the amount of dividend distribution is Rs 2,00,000 (i.e. 20 percent) of share capital. Hence, such distribution in in excess to section 71(2) of the Act. It can distribute up to Rs 1,80,000 only. In other words, it may appropriate but shall not distribute in excess to 18 percent of share capital in a fiscal year. Further, such distribution had to be made after appropriating the net profit in following funds:

1) As per clause (a) of subsection (2) of section 68 of Cooperative Act 2074, at least 25 percent of net saving (i.e. net profit) shall be appropriated to general reserve fund.
2) As per clause (a) of subsection (2) of section 68 of Cooperative Act 2074, at least 25 percent of net saving (i.e. net profit) shall be appropriated to general reserve fund.
3) After appropriating the amount for general reserve fund under section 68(2)(a), at least 25 percent of residual amount shall be appropriated to capital redemption reserve fund pursuant to subsection (2) of section 69.
4) After appropriating the amount for general reserve fund under section 68(2)(a), at least 0.5 percent of residual amount shall be appropriated to cooperative promotion fund pursuant to subsection (2) of section 70.

ii. As per section 38(k) of Cooperative Act, 2074, the loan shall be written off by the decision of Annual General Meeting of the concerned cooperative. The Act and its Rules has not mandated to write it off by special majority as in previous Act. Hence, such loan may be written off as per decision by simple majority of attended members in the AGM.
Hence, in the given case, the loan written off by the BoD is not legally valid.

Question No. 24:

Public Co-operative Limited with Rs. 5,00,000 total Share Capital and with 40% shareholding by the Government of Nepal, 20% by Mr. Ram Prasad and remaining by others was established one year ago. The Co-operative accepted deposits, extended credit and performed other banking activities among its members and made net surplus to the tune of Rs. 2,00,000. The net surplus is appropriated as follows:

General Reserve	Rs. 40,000
Share Dividend Fund	Rs. 40,000
Staff Bonus Fund	Rs. 20,000
Co-operative Education Fund	Rs. 20,000
Sangrakshit Fund	Rs. 20,000
Co-operative Dev. Fund	Rs. 30,000
Loss Equalization Fund	Rs. 30,000

i. Are the shareholdings of the Government of Nepal and Mr. Ram Prasad in accordance with the Co-operative Act, 2048?
ii. Can the Co-operative perform banking activities?
iii. Are all the appropriations of surplus sufficient and in accordance with the Act?

[June, 2007](5 Marks) [December, 2003](3 Marks)

Answer:

i. As per section 63(2) of the Co-operative Act, 2074, a cooperative society is not entitled to sell shares exceeding 20% of its total share capital to any single member except the institution or entity fully or partially owned or controlled by the Government of Nepal.
Hence, in the above case, shareholdings of Government of Nepal subject to section 135 of the Act and Mr. Ram Prasad are in accordance with the Co-operative Act 2074 and thus valid.

ii. Section 12 and Chapter 8 of Cooperative Act, 2074 prescribes about the constitution of Cooperative Bank and operation of its banking transactions as follows:
As per section 12 of the Act, associations or societies may jointly constitute a cooperative bank with the objective of accepting deposit of societies or associations, issuing loan to such societies or associations or making available banking services to such societies or associations taking prior approval of Nepal Rastra Bank. Hence, the Co-operative cannot perform banking activities as per Cooperative Act, 2074. Only a cooperative bank established under Cooperative Act, 2074 after taking prior approval from Nepal Rastra Bank may operate banking transaction.

iii. As per chapter 10 of the Act, the appropriation shall be made in following ways:
As per clause (a) of subsection (2) of section 68 of Cooperative Act 2074, at least 25 percent of net saving (i.e. net profit) shall be appropriated to general reserve fund.
After appropriating the amount for general reserve fund under section 68(2)(a), at least 25 percent of residual amount shall be appropriated to capital redemption reserve fund pursuant to subsection (2) of section 69.
After appropriating the amount for general reserve fund under section 68(2)(a), at least 0.5 percent of residual amount shall be appropriated to cooperative promotion fund pursuant to subsection (2) of section 70.
Other than the fund prescribed under section 68, 69 & 70 of the Act, the other funds in the cooperative society shall be as prescribed.
As per rule 27 of Cooperative Rules 2075, after appropriating the amount for funds under section 68, 69 & 70 of the Act, at least five percent of the residual amount shall be distributed to following funds:
   a) Cooperative Education Fund
   b) Share Dividend Fund
   c) Employee Bonus Fund
   d) Cooperative Development Fund
   e) Loss Recovery Fund
   f) Community Development Fund
   g) Stabilization Fund approved by the general meeting under sub section 5 of section 103
   h) Other Risk Management Fund

   While distributing the bonus amount under clause (c) of sub rule (1), the amount of bonus shall not be distributed exceeding more than 3 month salary.

Question No. 25:
Write short notes on write-off of loan by co-operative society.

[June, 2006](5 Marks) [December, 2003](2 Marks)

Answer:
As per section 38(k) of Cooperative Act, 2074, the loan shall be written off by the decision of Annual General Meeting of the concerned cooperative. The Act and its Rules has not mandated to write it off by special majority as in previous Act. Hence, such loan may be written off as per decision by simple majority of attended members in the AGM.

Question No. 26:
Ram Sharan, a member of Goodwill Co-operative Society having a loan of Rs. 50,000 outstanding in his name, decides to resign from the society to take holy orders. Can his resignation be accepted? Can Ram Sharan acquire membership of the society again once it is terminated?

[December, 2005](5 Marks)

Answer:
As per provision to section 34(2) of the Co-operative Act 2074, a member who has not yet repaid in full any loan availed by him from the society, or any other amount due to the society, cannot resign from the membership of the society.
Hence, Ram Sharan cannot resign from the Society before clearing the outstanding loan. Ram Sharan can apply to re-acquire membership of Goodwill Co-operative Society only after one year from the date of termination of his membership (sub-rule 2 of Rule 6).

Question No. 27:
The total share capital of Janata Co-operative Society Limited is Rs. 50, 00,000 divided into 50,000 shares of Rs. 100 each. During the financial year ended 2003/04, the Society made a surplus of Rs. 25, 00,000. Out of the Surplus, the Society, transferred Rs. 5, 00,000, being 20% of the surplus to the Reserve Fund and Rs. 3, 75,000, being 15% of the surplus appropriated for dividend to members and rest of the surplus amount appropriated for other funds. Examine the validity of the appropriation made by the Society in the light of the provisions of the Co-operative Society Act 1992.

[June, 2005](5 Marks)

Answer:
As per clause (a) of section 68(2) of the Co-operative Act 2073, at least 25% i.e. $1/4^{th}$ of the net surplus should be credited to the General Reserve Fund. The total surplus of the Janata Co-operative Society for the F/Y 2003/04 was Rs. 2,500,000. Out of the surplus, the society transferred only Rs. 500,000 to the Reserve Fund, which was only $1/5^{th}$ of the surplus. Therefore, the society has violated the provisions of section 68(2)(a) due to non-compliance of transferring of at least 25% of the surplus to the Reserve Fund. Further, proviso clause to section 71(2) also provides that

the amount of dividend in any year distributed to the shareholders share not exceed 18% of its share capital. The total capital of the society is Rs. 5,000,000. Accordingly, the amount of dividend to be distributed is limited to the extent of Rs. 900,000. The society appropriate only Rs. 375,000 as dividend, which was complied with the provisions of the Act.

Question No. 28:

A Co-operative society limited with a paid up capital of Rs. 5 Lakhs made an operating profit Rs. 10 Lakhs in a financial year and it passed a resolution to pay a dividend at 15% i.e. (Rs. 150,000). In that profit interest received Rs. 50,000/- was also included as a part of operating profit. Decide the issue of dividend distribution under the co-operatives Act.

[June, 2005](5 Marks)

Answer:

As per proviso clause to section 71(2) of Cooperative Act 2074, the amount of dividend in any year distributed to the shareholders share not exceed 18% of its share capital.

Hence, in the given case, the dividend that can be paid to the maximum extent is up to 18% of the paid up capital, not the 15% of the profit. So the dividends that can be paid maximum is Rs. 90,000 (being 18% of Rs. 5 lakhs which is the paid up capital).

Question No. 29:

Goodwill Co-operative society registered with a total capital of Rs. 10, 00,000 wishes to offer its shares carrying voting rights indicated against each as follows:

S.No.	Shareholder	Share Capital	Voting Right
a.	General Members (20 nos.)	2,00,000	4 votes
b.	Hongkong Cooperative Society	3,00,000	6 votes
c.	HMG	2,50,000	5 votes
d.	Alpine Finance Co. Pvt. Ltd.	2,50,000	5 votes

Point out the irregularities in the proposed sale of the Society's shares and suggest rectification

[December, 2004](5 Marks)

Answer:

a) As per section 63(2) of the Co-operative Act, 2074, a cooperative society is not entitled to sell shares exceeding 20% of its total share capital to any single member except the institution or entity fully or partially owned or controlled by the Government of Nepal. Hence, Goodwill Cooperative Society is not entitled to sell its share of Rs 3,00,000 which is thirty percent of total share capital to a single member Hongkong Cooperative Society. Instead, it can sell only 20% of its shares i.e. Rs. 2,00,000 only to Hongkong Co-operative Society subject to the condition they do not carry on competitive business belonging to same level pursuant to Chapter 5 of the Act.

b) As per 30(1) of the Act, only Nepali citizens attaining 16 years of age are eligible to become members of the society. However, as per subsection (2) of the Act, entities of Government of Nepal, Province Government, Local Bodies, Cooperative Schhols and community schools, guthi, local clubs, nonprofit motive organization established at local level, production and service oriented institution, consumers group are not restricted to become member of the cooperative. Hence, entities fully or partially owned or controlled by government of Nepal can become a member of the Cooperative, not the GoN itself unlike in repealed Cooperative Act, 2048.

c) As per Section 30(2) of the Co-operative Act 2074, Alpine Finance Co. Pvt Ltd, being an entity (i.e. a private company) with profit motive cannot become a member of the cooperative.

d) As per section 136 of the Act, irrespective of capital subscription, every member is entitle to use voting right on the basis of one person one vote. So, the allotment of voting right proportionate to the shares bought is incorrect and all shareholders will carry one vote each.

CHAPTER-12

INSOLVENCY ACT 2063

Question No. 1 :

Tina Seth, a professional lawyer, applied for liquidator license in Office. The Office has not responded her application saying that her qualification is not sufficient for the liquidator license. What are the qualifications and requirements to obtain the liquidator license and how Tina can get the license? Answer by referring the provisions of Insolvency Act, 2063. **(December 2022) (6 Marks)**

Answer:

Section 64 of Insolvency Act, 2063 has made provisions for obtaining the license.

i) A person who is desirous of obtaining a license pursuant to Sub-section (1) of Section 63 shall make an application, along with the prescribed fee, to the Office in the prescribed format.

ii) A person who makes an application pursuant to Sub-section (1) shall meet the following conditions:
- Have completed the age of thirty five years;
- Being a member of the prescribed professional association;
- Having acquired at least bachelor's degree in commercial law, commerce, management, accounts or any other prescribed subject from a recognized university;
- Having abode in the State of Nepal;
- Being competent to carry on insolvency practice under this Act.

iii) On receipt of an application under Sub-section (1), the Office shall, if it considers appropriate to issue a license to carry on the insolvency practice, issue the license in the prescribed format.

iv) The license issued pursuant to Sub-section (3) shall be renewed prescribed.

Question No. 2 :

The financial position of a ABC Co. Ltd is degrading day by day due to the existing fuel crisis and status of the business activities. Thus, certain creditors of the company are of the opinion that the financial status of the company is not satisfactory. Hence, they made up their mind to liquidate company as early as possible. In such situation, they approached you regarding the process to be adopted in this regard how would you suggest them relating to the following issues:

i) The situations when the Company deemed to have become insolvent.
ii) Who can make an application for the compulsory liquidation of a company?
iii) The commencement of the insolvency proceedings as per the Insolvency Act, 2063.

(June 2022) (2+2+6=10)

Answer:

i) Pursuant to Section 7(1) of the Insolvency Act, 2063 a Company is deemed to have become insolvent on the following condition:

(a) The general meeting of shareholders adopts a resolution that the company has become insolvent or a meeting of the board of directors of the company makes such decision; or
(b) The Court issues an order requiring the company to pay the debt and the debt is not paid up within thirty five days from the date of receipt by the company of such order; or
(c) The company fails to pay the debt within thirty five days after the service by the creditor on the company a notice for the payment of the debt or fails to make an application to the Court within the said period to void such notice.

As per the proviso clause of Section 7(2) nothing contained in this Section shall prevent the establishing of the fact that a company has become insolvent where it is proved from any other matter that the liability of the company exceed the value of the assets of the company or the company itself admits that it has become insolvent.

i. Pursuant to Section 4(1) of the Insolvency Act, 2063, where it is required to institute insolvency proceedings against any company an application has to be made to the court in a prescribed form by any of the following persons: A company itself which has become insolvent;
ii. At least ten percent creditor or creditors who has or have lent money to the company;
iii. Shareholder or shareholders that has or have subscribed at least five percent of shares,
iv. Debenture-holder or debenture-holders that has or have subscribed at least five percent of debentures,
v. A liquidator who has been appointed to liquidate a company; or
vi. In the case of a company that carries on any specific type of business set forth in Section 8, like bank or insurance business, a body authorized to administer and regulate such business.

ii) Pursuant to Section 4(2) of this Act, in order for an application to be made pursuant to Sub-section (1) above, a period of thirty -five days should have been expired after a notice issued to pay the debt referred to in Section 5 of this Act has been duly served on the concerned company.

Pursuant to Section 4(3) of this Act, every application to be made pursuant to Sub-section (1) shall be accompanied by the reason for making the application, short description of the

financial condition of the company and the evidence supporting the fact that the company has become insolvent and the following details, as well:

(a) Where the company itself which has become insolvent makes such application:
(I) A document certified by the board of directors of the company, mentioning that the company has become insolvent;
(2) A special resolution adopted by the board of directors of the company to institute the insolvency proceedings pursuant to this Act;
(3) Certified copies of the balance sheet and audit report of the company available at the time of making application for the institution of insolvency proceedings.

(b) Where the creditor of a company which has become insolvent makes such application:
(1) A statement of the principal and interest of the debt which the creditor claims to be due and payable by the company;
(2) The date on which the company borrowed the debt claimed by the creditor and the reason why the debt was borrowed;
(3) Description that the amount referred to in Clause (1) is due and such amount is payable immediately;
(4) That the debtor believes or the reason and ground the debtor has to believe that the company in respect of which demand is made for insolvency proceedings has become insolvent.

(c) Where the liquidator makes such application:
(1) Evidence that the company in respect of which application is made for insolvency proceedings has appointed the liquidator for the purposes of liquidation of the company; and
(2) The opinion expressed by the liquidator on the matter that the company in respect of which application is made for insolvency proceedings has become insolvent, and the ground for such opinion.

(4) Notwithstanding anything contained elsewhere in this Section, any shareholder or debenture-holder of a company shall obtain permission of the Court to make an application for insolvency proceedings pursuant to Clause (c) or (d) of Sub-section (1), and the shareholder or debenture holder may, If so permitted, make an application on such terms and conditions as may be specified by the Court.

(5) The Court shall not give permission referred to in Sub-section (4) unless and until sufficient evidence proving that the company has become insolvent is produced.
Pursuant to Section 5 of this Act, prior to making an application to the Court as per Section 4 for insolvency proceedings, a notice should be sent to the registered office of the company in the prescribed form for the payment of debt by the creditor or by his authorized agent.

Pursuant to Section 6(1) where the notice received pursuant to Section 5 is not reasonable or where there are any other reason for not repaying the debt immediately, the concerned company may make an application to the Court in order to void the notice, not later than thirty five days after the date of receipt of that notice.

(2) Where the application referred to in Sub-section (1) is made, the Court will issue a notice summoning the creditor giving the notice referred to in Section 5 to appear before the Court within seven days; the notice to be so issued shall also be accompanied by a copy of such application.

(3) The Court may make a decision to void or not to void the notice issued pursuant to Section 5 no later than seven days after the date of appearance of the creditor pursuant to Sub-section (2) or after the date of expiration of the time prescribed for the appearance before the Court where the creditor has failed to make such appearance.
(4) The Court may issue an order to void the notice issued pursuant to Section 5 on the following condition:

(a) There is a clear dispute as to whether the creditor has extended debt to the company or not; or
(b) The debt due to be paid by the company to the creditor does not appear to be payable immediately.

(5) Where the Court issues an order pursuant to Sub-section (4), notice that is issued to pay the debt can be given to the company again on the same matter nor can an application be made for the institution of insolvency proceedings until the condition set forth in that Sub-section continues to exist.

(6) Where the Court does not issue an order pursuant to Subsection (4), the company should pay the debt of creditor no later than thirty five days from that date.

Question No. 3 :
Mr A, B and C having 6% of total share capital of XYZ Ltd, would like to commence a process of liquidation. They aren't aware on the process of liquidation and consulted you regarding this issue. Suggest them how liquidation process can be commenced? Who can apply for the commencement of liquidation process? Provide your answer on the basis of Insolvency Act, 2063.
(December 2021) (7 Marks) (Dec, 2020) (7 marks)

Answer:

Liquidation of a company means a situation where the registration of a company is cancelled by fulfilling the procedures mentioned in the insolvency Act. Section 4 of the Insolvency Act, 2063 mentions about the process of commencing liquidation process which is as follows:

(1) Where it is required to institute liquidation proceedings against any company, any of the following persons may make an application to the Commercial Bench of the concerned High Court in the prescribed form for the commencement of such proceedings:

(a) A company itself which has become insolvent;

(b) Out of the total creditors of a company which has become insolvent, at least ten percent creditor or creditors who has or have lent money;

(c) Shareholder or shareholder/s that has or have subscribed at least five percent of shares, out of the total shareholders of a company;

(d) Debenture-holder or debenture-holders that has or have subscribed at least five percent of debentures, out of the total debenture-holders of a company;

(e) A liquidator who has been appointed to liquidate the company; or

(f) In the case of a company that carries on any specific type of business set forth in Section 8 of this Act, a body authorized to administer and regulate such business.

(2) In order for an application to be made pursuant to Sub-section (1), a period of thirty five days shall have been expired after a notice issued to pay the debt referred to in Section 5 of this Act has been duly served on the concerned company.

(3) Every application to be made pursuant to Sub-section (1) above shall be accompanied by the reason for making the application, short description of the financial condition of the company and the evidence supporting the fact that the company has become insolvent and the following details, as well:

(a) Where the company itself which has become insolvent makes such application:

(i) A document certified by the board of directors of the company, mentioning that the company has become insolvent;

(ii) A special resolution adopted by the board of directors of the company to institute the insolvency proceedings pursuant to this Act;

(iii) Certified copies of the balance sheet and audit report of the company available at the time of making application for the institution of insolvency proceedings.

(b) Where the creditor of a company which has become insolvent makes such application:

(i) A statement of the principal and interest of the debt which the creditor claims to be due and payable by the company;

(ii) The date on which the company borrowed the debt claimed by the creditor and the reason why the debt was borrowed;

(iii) Description that the amount referred to in Clause (1) is due and such amount is payable immediately;

(iv) That the debtor believes or the reason and ground the debtor has to believe that the company in respect of which demand is made for insolvency proceedings has become insolvent.

(c) Where the liquidator makes such application:

(i) Evidence that the company in respect of which application is made for insolvency proceedings has appointed the liquidator for the purposes of liquidation of the company; and

(ii) The opinion expressed by the liquidator on the matter that the company in respect of which application is made for insolvency proceedings has become insolvent, and the ground for such opinion.

(4) Notwithstanding anything contained elsewhere in this Section, any shareholder or debenture-holder of a company shall obtain permission of the Court to make an application for insolvency proceedings pursuant to Clause (c) or (d) of Sub-section (1), and the shareholder or debenture-holder may, if so permitted, make an application on such terms and conditions as may be specified by the Court.

(5) The Court shall not give permission referred to in Sub-section (4) in above unless and until sufficient evidence proving that the company has become insolvent is produced.

Question No. 4 :

After a long legal proceeding, the court declared Damodar Metal Industries Ltd. as insolvent and ordered its liquidation by appointing a liquidator to accomplish the liquidation process of the company. Answer the following questions pursuant to the Insolvency Act, 2063.

iv) Explain the consequences of the commencement of liquidation proceedings of the company under the Act.

v) Can the liquidator initiate and accomplish conversion of liquidation of the company into restructuring program? If yes, how?

(June, 2021) (7 marks)

Answer:

i) Section 38 of the Insolvency Act, 2063 provides the consequences on the commencement of liquidation proceedings as under:

(1) On the commencement of the liquidation proceedings of a company (in this case Damodar Metal Industrial Company), the following provisions shall govern the following matters in relation to such company:

(a) Where the director and officer of the company are relieved of office, the liquidator shall exercise all such powers as may be exercisable by the director and officer of the company in relation to the management of that company;

(b) The liquidator shall take in his or her custody and control all assets, accounts and books of account of the company, except the properties in possession of secured creditors;

(c) Except as ordered otherwise by the liquidator, the service of all employees appointed by the company shall terminate.

(2) The provision relation to *ipso facto* suspension set forth in Section shall, except for the following matter, apply during the period of currency of liquidation proceedings:

(a) Implementation of the right of secured creditors to execute pursuant to this Act; or

(b) Implementation of the right of the lessor of any property leased to the company to redeem the property pursuant to this Act.

ii) The Liquidator can initiate and accomplish conversion of liquidation of the company into restructuring program under section 39 of this Act as under:

(1) Where, based on the study and examination of the business and assets of the company, nature of the goods or services to be produced by the company and market potentiality thereof, the liquidator thinks that the restructuring program of the company can be adopted by a meeting of creditors and approved, the liquidator may make an application, accompanied by the reasons, to the Court for an order to keep pending the order on liquidation of company issued by the Court pursuant to this Act for a certain period of time and to implement the restructuring program pursuant to this Act.

(2) Where the Court is satisfied with the contents of the application received pursuant to Sub-section (1) above, it may issue an order to suspend the order on liquidation of a company issued previously for any certain period of time and implement the restructuring program.

(3) Where an order is issued pursuant to Sub-section (2) above, the order shall be implemented pursuant to this Act.

Question No. 5 :

The business of Solukhumbu Solar Power Company Ltd. is in decreasing trend. The Board of Directors (BoD) of the company tried their best to maintain the business of the company. The whole effort of BoD has gone in vain. As a result, the financial position of the company is not in a position to bear its liabilities as per the financial statement and also clearly stated it in the audit report of the company. Thus, its shareholders are interested to liquidate it compulsorily as to the

existing financial position. However, the BoD are still in optimistic and not interested to liquidate the company. Because of the pressure from the shareholders, the BoD are forced to initiate the insolvency proceedings of the company. How would you explain the BoD if they consulted you as an expert regarding the following questions:

i) When a company can be deemed as an insolvent under the Insolvency Act, 2063?
ii) How insolvency proceedings can be proceed?
iii) State where there is no application required for the insolvency proceedings of certain companies.

(December, 2019) (4+2+4=10 marks)

Answer:

i) According to Section 7 of the Insolvency Act, 2063, a company will be deemed to have become insolvent in the following conditions:

a) Where the general meeting of shareholders adopts a resolution that the company has become insolvent or a meeting of the board of directors of the company makes such decision; or
b) Where the Court issues an order requiring the company to pay the debt and the debt is not paid up within thirty five days from the date of receipt by the company of such order; or
c) Where the company fails to pay the debt within thirty five days after the service by the creditor on the company a notice for the payment of the debt or fails to make an application to the Court within the said period to void such notice.

Nothing contained in this Section shall prevent the establishing of the fact that a company has become insolvent where it is proved from any other manner that the liability of the company exceed the value of the assets of the company or the company itself admits that it has become insolvent.

ii) According to Section 4 of the Insolvency Act, 2063, an application is to be made to the Court for insolvency proceedings.

Where it is required to institute insolvency proceedings against any company, any of the concerned person like shareholder, creditor or debenture-holder having the qualification as prescribed may make an application to the Court in the prescribed format for the institution of such proceedings.

iii) Section 8 of the Act prescribes that insolvency proceedings may be initiated in case of certain companies although there is no application from the concerned persons. In pursuant to Section 8 of the Act, no application may be made to the Court for insolvency proceedings in relation to the following company without obtaining prior approval of the following authority:

a) In the case of a bank or financial institution carrying on banking and financial business, the Nepal Rastra Bank, or

b) In the case of an insurance company carrying on insurance business, the Insurance Board formed pursuant to the Insurance Act, 2049, or

c) In the case of a company which cannot undergo voluntary liquidation without approval of the competent body or authority, except that mentioned in Clause (a) or (b), such authority.

Every application to be made for insolvency proceedings in relation to a company as mentioned above should be accompanied by a copy of the approval given by the authority set forth in that Sub-section for that purpose.

Question No. 6:

Audit report of the Himalayan Water Ltd. shows that the amount of liabilities exceeds the value of assets of the company. So, the company couldn't fulfill its financial liability to its creditor. Possibly, there shall be the queue of creditor who demands their investment. Company is in dilemma that how the liability is settled. Other side, the creditors, shareholders, debenture holders of the company have their own claimant that how the investment being made to the company is restituted? In this situation, you are employed for as a liquidator of the company. Provide a report on following requirements referring Insolvency Act, 2063.

i. What are the conditions company deemed to be an insolvent?
ii. Who can submit an application for the institution of insolvency proceedings and where?
iii. What are the functions, duties and powers of a liquidator?

[June, 2019](2+2+4=8 Marks)

Answer:

i. There is the insolvency situation in the said company. Section 2(b) has defined the world "being insolvent" as a state of being unable, or appearing to be unable, to pay any or all of the debts due and payable to or payable in the future to creditors or a situation where the amount of liabilities of a company exceeds the value of the assets. In regard to the company, it shall be deemed to have become insolvent on the following condition (Section 7).

(a) The general meeting of shareholders adopts a resolution that the company has become insolvent or a meeting of the board of directors of the company makes such decision; or

(b) The Court issues an order requiring the company to pay the debt and the debt is not paid up within thirty five days from the date of receipt by the company of such order; or

(c) The company fails to pay the debt within thirty five days after the service by the creditor on the company a notice for the payment of the debt or fails to make an application to the Court within the said period to void such notice. 4. Application to be made for insolvency proceedings: (1) Where it is required to institute insolvency proceedings against any company, any of the following persons may make an application to the Court in the prescribed form for the institution of such proceedings:

ii. Any of the following persons may make an application before a court to initiate of the insolvency proceedings: Section 4

(a) A company itself which has become insolvent;
(b) Out of the total creditors of a company which has become insolvent, at least ten percent creditor or creditors who has or have lent money;
(c) Shareholder or shareholders that has or have subscribed at least five percent of shares, out of the total shareholders of a company;
(d) Debenture-holder or debenture-holders that has or have subscribed at least five percent of debentures, out of the total debenture-holders of a company;
(e) A liquidator who has been appointed to liquidate a company; or
(f) In the case of a company that carries on any specific type of business set forth in Section 8, a body authorized to administer and regulate such business.

iii. A liquidator shall be appointed by a court amongst the persons entitled to carry on insolvency business. He/she has following functions, duties and powers:

(a) To institute or defend any case or legal action on behalf of the company;
(b) To appoint employees to assist in the discharge of his or her functions;
(c) Where any installment on any share of the company is due, to make a call on the shareholder for payment of such installment;
(d) To do and execute, or cause to be done and executed, all such acts and deeds or documents as required to be done and executed on behalf of the company and in the name of the company and use the seal of the company for that purpose;
(e) To borrow loans against security of the assets of the company;
(f) Where the liquidator considers that the sale and disposal of any property or termination of any contract or liability will render benefits to the company, to sell and dispose of such property or terminate such contract or liability;
(g) To enter into compromise with any creditor of the company or any person who claims to be a creditor of the company in relation to the claim made by such creditor or person;
(h) To enter into compromise with any person against whom the company may make a claim in relation to any loan, liability or any other claim;
(i) To sell the assets of the company and distribute the proceeds of such sale pursuant to this Act; and
(j) To perform, or cause to be performed all such other acts as may be necessary to liquidate the company.

Question No. 7 :

When a company can be deemed to have become insolvent under the Insolvency Act, 2063? Explain the cases when insolvency proceedings can proceed, in respect of certain companies although there is no application for the insolvency proceedings.

[June, 2018](7 Marks)

Answer:

1) According to Sec. 7(1) of the insolvency Act 2063, a company will be deemed to have become insolvent on the following condition:

(a) Where the general meeting of shareholders adopts a resolution that the company has become insolvent or a meeting of the board of directors of the company makes such decision; or

(b) where the Court issues an order requiring the company to pay the debt and the debt is not paid up within thirty five days from the date of receipt by the company of such order; or

(c) Where the company fails to pay the debt within thirty five days after the service by the creditor on the company a notice for the payment of the debt or fails to make an application to the Court within the said period to void such notice.

2) Nothing contained in this Section shall prevent the establishing of the fact that a company has become insolvent where it is proved from any other matter that the liability of the company exceed the value of the assets of the company or the company itself admits that it has become insolvent.

According to Section 4 of the Insolvency Act 2063, an application is to be made to the court for insolvency proceedings.

Where it is required to institute insolvency proceedings against any company, any of the concern person like shareholder, creditor or debenture holder having the qualification as prescribed may make an application to the Court in the prescribed format for the institution of such proceedings.

Section 8 of the Act prescribes that an insolvency proceedings may be initiated against certain companies although there is no application from the concern persons. In pursuant to Section 8 of the Act, no application may be made to the Court for insolvency proceedings in relation to the following company without obtaining prior approval of the following authority:

(a) In the case of a bank or financial institution carrying on banking and financial business, the Nepal Rastra Bank, or

(b) In the case of an insurance company carrying on insurance business, the Insurance Board formed pursuant to the Insurance Act, 2049, or

(c) In the case of a company which cannot undergo voluntary liquidation without approval of the competent body or authority, except that mentioned in Clause (a) or (b), such authority.

Every application to be made for insolvency proceedings in relation to a company as mentioned above should be accompanied by a copy of the approval given by the authority set forth in that Sub-section for that purpose.

Question No. 8:

The creditors of BCZ Limited have applied to the Court for the insolvency proceeding of the company. However in making hearing on an application made to the Court, it appeared that there exist some situations in the company which may prejudice the interests of the creditors, and the Court has issued interim order in these circumstances:

i. What are these circumstances so that the Court deemed necessary to issue interim orders?
ii. While issuing the interim orders, the Court may issue order restraining from doing some activities. What are these activities?

[December, 2017](7 Marks)

Answer:

i. Section 11(1) of the Insolvency Act, 2063 has explained the various situations under which the Court issues interim orders. These are as follows:

- The assets of the company have been sold and disposed of wrongfully or there exists a possibility of such sale and disposal;
- The management of the company has not been carried out properly;
- Any legal action is going to be instituted or such action is going to be enforced or there exists a possibility of such enforcement in such a manner as to prejudice the assets of the company;

ii. As per section 11(2), in the following situations, the court may issue order restraining from doing any or all of the following acts is;

- Transferring, selling and disposing of , or otherwise mortgaging or pledging, any assets of the company,, other than that business of the company which it has been carrying on in the ordinary course of business;
- Transferring the shares of the company in any manner or altering the status of the shareholders of the company in any manner;
- Withholding or foreclosing any assets of the company by any person; or
- Instituting any legal action or keeping on such action or taking any action or foreclosing by any creditor or person against the assets of the company or any assets owned or possessed or foreclosed by the company.
- Where an order is issued by the Court pursuant to sub section 2 above, information thereof shall be given to the concerned company, company registrar and Insolvency Administration office, and where the court thinks fit it may also issue order requiring to publish such information in daily paper of national circulation in a manner that the general public can get such information.
- The court may if it considers necessary issue order to appoint any appropriate person as the interim administration of the company for the interim management of the company during the currency of the interim order.
- The function, duties and powers of the interim administrator appointed pursuant to sub-section 4 above shall be as prescribed by the court at the time of such appointment. *(.5)*

- Where the court issues order for inquiry into insolvency proceedings or dismisses the application, the interim order issued pursuant to this section shall *ipso facto* be ineffective.

Question No. 9 :

Prudent Commercial Bank wants to get insolvent, but it has no idea how to proceed with. It needs to get appropriate information as to the relevant laws and procedures. Whether it has to get prior approval, and/or approach to the Court to institute insolvency proceedings? And what other legal requirements it has to fulfill for this purpose? Give your legal opinion in the light of the Insolvency Act, 2063.

[June, 2017](7 Marks)

Answer:

Prudent Commercial Bank in order to get insolvent has to fulfill certain legal requirements under the Insolvency Act, 2063. In pursuance to section 3 of the Insolvency Act, 2063, save as ordered by the Commercial Bench of the concerned High Court (Court) pursuant to this Act, no person shall commence insolvency proceedings against any company.

As a rule, where it is required to institute insolvency proceedings against any company, any of the concerned persons as per Section 4(1) may make an application to the Court in the prescribed form for the institution of such proceedings.

In pursuance to section 4(1)(a) of this Act, in order to get insolvent Prudent Commercial Bank itself should apply to the Court in the prescribed form for insolvency proceedings. Notwithstanding, anything contained in section 4 above, Prudent Commercial Bank carrying on banking and financial business shall obtain prior approval of Nepal Rastra Bank (NRB) for applying to the Court in order to institute insolvency proceedings pursuant to section 8(1)(a) of this Act. Pursuant to section 8(2) of this Act, a copy of such NRB approval must be accompanied to the application filed before the court under section 4(1) of this Act.

Further, pursuant to section 4(3) of this Act, every application to be made pursuant to section 4(1) above shall be accompanied by the reason for making the application, short description of the financial condition of the company and the evidence supporting the fact that the company has become insolvent and the following details as well: Where Prudent Commercial Bank, itself which has become insolvent makes such application shall under section 4(3)(a) of the Insolvency Act, 2063 supply the following details along with the application: (1) a document certified by the Board of Directors of the company, mentioning that the company has become insolvent; (2) a special resolution adopted by the Board of Directors of the Company to institute the insolvency proceedings pursuant to this Act; (3) Certified copies of the balance sheet and audit report of the company available at the time of making application for the institution of insolvency proceedings.

Prudent Commercial Bank which claims it to be insolvent shall be deemed to have become insolvent once the general meeting of the shareholders of the company adopts a resolution that the company has become insolvent or a meeting of the Board of Directors of the Company makes such decision under section 7(1) (a) of the Act save as otherwise proved.

Question No. 10 :

You are appointed the liquidator of TPT Company Ltd by a special resolution of the company. The board of directors of the company has given a declaration of solvency as required by the act while proposing the resolution for winding up the company that the company is in a position to pay-off all its liabilities. However, when you as a liquidator took over the assets and liabilities, you found that the existing assets could not generate sufficient fund to pay-off the liabilities. State what further course of action you have to take against the board of directors and the company in such circumstances.

[December, 2016](6 Marks)

Answer:

Steps to be taken by the liquidator are:

First ascertain how the declaration of solvency was prepared by the directors. For the purpose call a meeting of the ex-directors (since the directors cease to hold office once the liquidator is appointed) and take clarifications form them regarding

(i) over valuation of assets

(ii) Suppression of liabilities or omission of contingent liabilities.

(iii)Any omission of assets or liabilities.

Make a minutes of the meeting and get it signed by the directors present. If all the directors or the person who was managing director who was responsible for the preparation of the declaration is absent then another opportunity of meeting should be given.

If in the next meeting if all the directors are present, if there is a real deficiency, and if the directors agree to make up the deficiency, then the liquidator after getting written acceptance and guarantee by them, can proceed further with the liquidation.

If there is no prospect of meeting the deficiency by contribution by the directors, then the company becomes an insolvent company.

The liquidator should call the meeting of the shareholders and the creditors under sec.114 of the companies Act and inform them the real financial condition of the company.

If the directors have not agreed to contribute the deficiency, resolution should be passed at the creditors meeting to inform the court under the insolvency Act to appoint the liquidator and carry out the liquidation of the company under the insolvency Act and accordingly inform the office of the Registrar enclosing the copy of resolution and file a petition with the court.

Then the liquidator has to apply to the court to appoint a liquidator and hand over charge to the liquidator so appointed by the court and cease from continuing as liquidator, after receiving the order form the court.

Question No. 11 :

Z End Limited is required to institute insolvency proceedings. Who can make application to the Court as per the Insolvency Act, 2063? Explain.

[December, 2015](5 Marks)

Answer:

Section 4 of Insolvency Act, 2063 has explained the application procedures and the person who can make the application for the proceedings as follows:

When it is required to institute insolvency proceedings against any company, any of the followings persons may make an application to the Court in the prescribed form for the institution of such proceedings:

a) A company itself which has become insolvent;
b) Out of the total creditors of a company which has become insolvent, at least ten percent creditor or creditors who has or have lent money;
c) Shareholder or shareholders that has or have subscribed at least five percent of shares, out of the total shareholders of a company;
d) Debenture – holder or debenture – holders that has or have subscribed at least five percent of debentures, out of the total debenture – holders of a company;

Question No. 12 :

Raman was appointed as the liquidator of XYZ Limited. During his working period he found that certain transitions as carried out by the company were voidable. Considering the provisions of the Act, he has made application to the Court to declare these transactions void. Point out these voidable transactions referring the provisions of Insolvency Act, 2063.

[December 2014][December, 2015](5 Marks)

Answer:

Section 59 of Insolvency Act, 2063 has defined voidable transactions as follows:

1) Where any company has become insolvent, the following transactions shall be void:
   a) Preferential transactions carried on within six months immediately preceding the commencement of the insolvency proceedings or within the period of six months after the commencement of the proceedings;
   b) Preferential transactions carried on with the associated persons of the company in advance of one year immediately preceding the commencement of the insolvency proceedings or within the period of one year after the commencement of the proceedings;
   Explanation; For the purpose of Clauses (a) and (b), the expression "preferential transactions" shall mean any transactions done or entered into with a provision for payment of amount that exceeds the payment which any creditor of the company other than a secrued creditor would have been entitled to get if the creditor had made a claim against the company at the time of its liquidation.
   c) Any under - valued transactions that have been carried on within one year immediately preceding the commencement of the insolvency proceedings or within the period of one year after the commencement of the proceedings and the company has become insolvent as a consequence of such transaction or other under - valued transactions carried on after the commencement of the insolvency proceedings;

Explanation: For the purposes of this Clause, the expression "under - valued transactions "shall mean any transactions in relation to which the company has received a value that is lower than the prevailing market value or has not received any value at all for any consideration given by the company to the other party to the transactions.

All fraudulent transactions carried on within two years immediately preceding the commencement of the insolvency proceedings or within the period of two years after the commencement of the proceedings;

Explanation: For the purposes of this Clause, the expression "fraudulent transactions" shall mean any transactions carried on, in relation to any assets of the company, with ulterior motive to cheat the creditors of the company or delay making payments to them or prejudice the rights of the creditors.

2) The liquidator shall make an application to the Court to have the transactions referred to in sub-section (1) declared void
3) While making an application pursuant to Sub - section (2), the liquidator shall prove that the company was insolvent when such transactions were carried on or the company has become insolvent by the reason of such transactions.
4) Where any associated person of the company is found involved in the proceedings carried out in relation to any Voidable transactions, it shall be presumed that the company was insolvent when such transactions were carried on or the company has become insolvent by the reason of such transactions.

Question No. 13:

In which conditions, a company shall be deemed to have become insolvent? Answer it in the light of the Insolvency Act, 2063.

[December, 2013](5 Marks)

Answer:

Section 7 of the Insolvency Act, 2006 prescribes the provision regarding the cases where a company shall be deemed to have become insolvent. According to it, as proved otherwise, a company shall be deemed to have become insolvent on the following conditions:

(a) The general meeting of shareholders adopts a resolution that the company has become insolvent or a meeting of the board of directors of the company makes such decision; or
(b) The Court issues an order requiring the company to pay the debt and the debt is not paid up within thirty five days from the date of receipt by the company of such order; or
(c) The company fails to pay the debt within thirty five days after the service by the creditor on the company a notice for the payment of the debt or fails to make an application to the Court within the said period to void such notice.

Section 7(2) further prescribes the provision that nothing contained in this Section shall prevent the establishing of the fact that a company has become insolvent where it is proved from any other matter that the liability of the company exceed the value of the assets of the company or the company itself admits that it has become insolvent.

Question No. 14 :

Sickwell Ltd. could not pay its creditors. Creditors went to the court and the court issued an order requiring the company to pay to the creditors. Forty days have passed since the court issued such order still the company did not pay to the creditors. Give your legal opinion whether the company can be called as insolvent or not.

[June, 2013](5 Marks)

Answer:

As per section 7 (1) of the Insolvency Act, 2063 a company shall be deemed to have become insolvent on the following conditions:

a) The general meeting of shareholders adopts a resolution that the company has become insolvent or a meeting of the board of directors of the company makes such decision; or
b) The Court issues an order requiring the company to pay the debt and the debt is not paid up within thirty five days from the date of receipt by the company of such order; or
c) The company fails to pay the debt within thirty five days after the service by the creditor on the company a notice for the payment of the debt or fails to make an application to the Court within the said period to void such notice.

Nothing contained in this Section shall prevent the establishing of the fact that a company has become insolvent where it is proved from any other matter that the liability of the company exceed the value of the assets of the company or the company itself admits that it has become insolvent.

While determining insolvents a court issues an order to the company to pay to the creditors in such case, the company must pay within 35 days. In the given case the company could not pay after 40 days of such notice. On this basis the company can be called as insolvent.

Question No. 15:

A group of creditors of Kanjus Ltd. desirous of moving the court praying for the liquidation of the Company and recovery of their dues from the company's assets, approach you for expert advice. Guide them.

[December, 2004](5 Marks)

Answer:

Section 4 of Insolvency Act, 2063 prescribes about the insolvency proceeding of a company by its creditors as follows:

As per sub-section (1), where it is required to institute insolvency proceedings against any company, out of the total creditors of a company which has become insolvent, at least ten percent creditor or creditors who has or have lent money may make an application to the Court in the prescribed form for the institution of such proceedings:

As per sub-section (2), in order for an application to be made pursuant to Sub-section (1), a period of thirty five days shall have been expired after a notice issued to pay the debt referred to in Section 5 has been duly served on the concerned company.

As per sub-section (3), every application to be made pursuant to Sub-section (1) shall be accompanied by the reason for making the application, short description of the financial condition of the company and the evidence supporting the fact that the company has become insolvent and the following details, as well:

Where the creditor of a company which has become insolvent makes such application:

1) A statement of the principal and interest of the debt which the creditor claims to be due and payable by the company;
2) The date on which the company borrowed the debt claimed by the creditor and the reason why the debt was borrowed;
3) Description that the amount referred to in Clause (1) is due and such amount is payable immediately;
4) That the debtor believes or the reason and ground the debtor has to believe that the company in respect of which demand is made for insolvency proceedings has become insolvent.

CHAPTER-13

MONEY LAUNDERING PREVENTION ACT, 2064

[Note: All answers suggested hereby have been updated as per Money Laundering Prevention Act, 2064 with Second Amendment 2070 and Some Nepal Acts Amending Act, 2075]

Question No. 1:
What do you mean by predicate offence? What offences are included as predicate offence under the Asset (Money) Laundering Prevention Act, 2064? **(December 2022) (6 Marks)**
Answer:

A predicate offences is **a crime that is a component of a more serious crime**. For example, producing unlawful funds is the primary offence and money laundering is the predicate offence. The term "predicate offence" is usually used to describe money laundering or terrorist financing activities.

A predicate offense – or predicate crime – refers to a crime which is a component of a larger crime. In a financial context, the predicate offense would be any crime that generates monetary proceeds. The larger crime would be money laundering or financing of terrorism.

Section 2ad has not defined but designated the predicate offence as provided in the annex of the Money Laundering (Prevention) Act, 2064. Pursuant to the annex, the predicate offence as categorized in the act is as follows:

i) **Any offence under the prevailing laws**
- Participation in an organized criminal group and illegal or racketeering,
- Disruptive (terrorist) act and terrorism,
- Trafficking in human being and migrant smuggling in any form,
- Any kinds of sexual exploitation including the child sexual exploitation,
- Illicit trafficking in narcotic drugs and psychotropic substances,
- Illicit trafficking in arms and ammunition,
- Illicit trafficking in stolen and other goods,
- Corruption and bribery,
- Fraud,
- Forgery,
- Counterfeiting of coin and currency,
- Counterfeiting and piracy of products or imitation, illegal copy or theft of products,
- Environmental crime,
- Murder, grievous bodily injury,
- Kidnapping, illegal restraint or hostage-taking,
- Theft or rubbery,
- Smuggling (including custom, excise and revenue),
- Tax (including direct and indirect),
- Extortion,
- Piracy,
- Insider Dealing and Market Manipulation in securities or commodities ,
- Ancient monument conservation,

- Forest, National park and wild animals conservation,
- Money, banking, finance, foreign exchange, negotiable instruments, insurance, cooperatives,
- Black marketing, consumer protection, competition, supply,
- Election,
- Communication, broadcasting, advertising,
- Transportation entrepreneurship, education, health, medicine or forgery in foreign employment,
- Firm, partnership, company, association,
- Real estate and property,
- Lottery, gambling, donation,
- Citizenship, immigration and passport.

ii) Offence of terrorist financing pursuant to section 4,

iii) Any other offence as designated by the Government of Nepal by publishing a notice in the Nepal Gazette, or

iv) An offence under a law of a foreign State, in relation to act or omission under paragraph (1), (2) or (3), which had they occurred in Nepal, would have constituted an offence.

Question No. 2:

Pan Singh Negi, a Nepali national and a notorious element was arrested in a hotel in Sinamangal, Kathmandu. During the search of his hotel room Nepal Police found with him a huge amount of money containing Nepalese currency, Indian Currency, US dollars, some Travellers Cheques, some VISA Cards and ATMs, one Kilogram of gold amounting more than the monetary limit under Asset (Money) Laundering Prevention Act, 2064 prescribed by Nepal Rastra Bank (NRB). Now the police has to start criminal investigations against him on money laundering offence as he has concealed huge amount of money lacking legal source of earning. Answer the following Questions on the above factual background taking into account of the legal provisions of Asset (Money) Laundering Prevention Act, 2064:

i. What is money laundering?
ii. Who will conduct criminal investigation and prosecution of case against Pan Singh Negi for Money Laundering offence?
iii. What punishment could he be sentenced in case he is convicted for the offense of Money Laundering? **(June 2022) (3+3+1=7)**

Answer:

i) Money laundering (ML) is a crime of purifying illegal proceeds. It is a process of converting criminally earned proceeds into white or legal one. It is an attempt where the source of income and destination of illegal proceeds is either concealed or diverted or deviously obtained by entitling the illegal proceeds with the mask of legitimate appearance.

Money laundering is a punishable criminal offence under the Asset (Money) Laundering Prevention Act, 2064. This Act prohibits to commit money laundering. Section 3 of this Act defines money laundering in the following words:

(1) No person shall commit or cause to commit any of the following acts:-

a. Converting and transferring property by any means knowing or having reasonable grounds to believe that it is proceeds of crime for the purpose of concealing or disguising the illicit origin of property, or assisting any person involved in the offence of evading legal consequences of offender.
b. Concealing or disguising or changing the true nature, source, location, disposition, movement or ownership of property or rights with respect to such property knowing or having reasonable grounds to believe that it is proceeds of crime.
c. Acquiring, using, possessing property knowing or having reasonable grounds to believe that it is the proceeds of crime.

(2) No person shall conspire to commit, aid, abet, facilitate, counsel, attempt, associate with or participate in the commission of the acts mentioned in subsection (1) above.

(3) Any person who commits any act mentioned in subsection (1) or (2) above, commits the offence of money laundering.

(ii). An Asset Laundering Prevention Department established by the Government of Nepal under section 11 of the above Act, will make investigation, enquiry and prosecution of this case of money laundering offence. The Chief of this Department shall be headed at least by a first class officer of civil service. The chief shall in pursuance to section 14 of this Act make or cause to make preliminary inquiry if he receives complaint of money laundering pursuant to section 13 and information from Financial Information Unit pursuant to section 10 of this Act. The above Department may appoint or prescribe an Investigation officer to conduct investigation and inquiry of this offence.

So far as the prosecution of this case is concerned, if after the investigation and inquiry it is found that accused Pan Singh Negi should be convicted for the offence of money laundering for keeping, concealing and hiding the illegal money without his source of income, the Department shall write to the concerned government attorney for taking decision whether a

case is to be filed against him or not. This Department shall file a case of money laundering against the accused Pan Singh Negi in the Special Court in case the Government Attorney decides in favour of filing a case against him, pursuant to section 22(2) of this Act.

(iii). In case accused Pan Singh Negi is convicted of money laundering offense he shall be punished a fine two times of the proceeds or imprisonment from two years to ten years as per the gravity of the commission of the act pursuant to section 30 of this Act.

Question No. 3:
What activities are considered as money laundering offence and the offence of terrorist financing under the Money Laundering Prevention Act, 2064? **(December 2021) (6 Marks)**

Answer:

Principally an offence refers to an act done against the state. In other words it refers to do an act whichhas been forbidden by law or prohibited by the prevailing law of the nation. In this context Government of Nepal has enacted an Act named "Asset (Money) Laundering Prevention Act, 2064" which is applicable to any person committing the offence of money laundering or terrorist financing irrespective of whether such person is located in Nepal or outside Nepal.

Chapter-2 of the Act prescribes the provisions relating to offences under it. According to it the offence has been classified into two:

i. laundering money, and

ii. committing offence of terrorist financing

According to Section 3 (1) of the Act, no person should commit or cause to commit any of the following acts:-

(a) Converting and transferring property by any means knowing or having reasonable grounds to believe that it is proceeds of crime for the purpose of concealing or disguising the illicit origin of property, or assisting any person involved in the offence for evading legal consequences of offender.

(b) Concealing or disguising or changing the true nature, source, location, disposition, movement or ownership of property or rights with respect to such property knowing or having reasonable grounds to believe that it is proceeds of crimes.

(c) Acquiring, using, possessing property knowing or having reasonable grounds to believe that it is the proceeds of crime.

Under Sec 3(2) no person shall conspire to commit, aid, abet, facilitate, counsel, attempt, associate with or participate in the commission of the acts mentioned in subsection (1).

Pursuant to sub-section (3), any person who commits any act mentioned in subsection (1) or (2), commits the offence of money laundering.

According to Section 4 of the Act it has been prohibited to commit offence of terrorist financing. Section 4(1) prohibits that no person shall, by any means, directly or indirectly, unlawfully and willfully, provide or collect funds with the intention that they should be used or in the knowledge that they are to or intended to be used, in whole or in part, in order to carry out a terrorist act, or by a terrorist or a terrorist organization.

The Act further prescribes the provision of prohibition in this respect under sub-sections as follows:

(2) No person shall attempt to commit any act mentioned in subsection (1).

(3) No person shall, by any means, directly or indirectly, provide or conspire to provide material support or resources to any terrorist or terrorist organization or in order to carry out a terrorist act or conspire for terrorist act.

(4) No person shall undertake any of the following acts in relation to any act mentioned in subsection (1), (2) or (3) :

(a) to participate as an accomplice in such act,

(b) to organize or direct others to commit such act,

(c) to contribute a group of persons which commits such act or has a common purpose of committing such act or willfully promote such group of persons for furthering their criminal activities or to achieve such purpose.

(5) It shall be the offence of terrorist financing if any of the following circumstances exist in relation to any act under this section:

(a) Even if the terrorist act does not occur or is not attempted,

(b) Even if funds were not actually used to commit or in the attempt the terrorist act,

(c) Even if such funds are linked or not to a specific terrorist act,

(d) Even if the terrorist act or intended terrorist act does occur or will occur in the same State or territory or somewhere else,

(e) Even if the terrorist organization and individual terrorist is or is not located in the same State or territory where the terrorist act is intended to or occurs,

Whether or not the funds are collected or provided from legitimate or illegitimate source,
Under Sec.4 subsection (6) it is clearly prescribed that any person who commits an act mentioned as above in subsections (1), (2), (3), (4) or (5) shall be considered as committing the offence of terrorist financing. If such act is committed in foreign state shall also be and offence of terrorist financing pursuant to section 5 of this Act.

Question No. 4:

What kinds of acts are deemed to have been committed the offence of money laundering? A person named 'Jugal Nepali', a Nepalese citizen, committed an offence of money laundering in Makau. Could the Money laundering prevention Act, 2064 attract on such offence? Answer it with reference to the Act.

(June, 2021) (7 marks)

Answer:

Money laundering shall refer to any of the following acts:

a. The conversion or transfer of funds, by any person who knows or should have known or there are reasonable grounds based on such evidence to believe that such funds are the proceeds of illegal sources, for the purpose of concealing or disguising the illicit origin of such funds or for assisting any person who is involved in the commission of the predicate offence to evade the legal proceedings or consequences of his/her actions.

b. The concealment or disguising of the true nature, source, location, disposition, movement or ownership of or rights over such funds by any person who knows or should have known or there are reasonable grounds on such evidence to believe that such funds are the proceeds of crime.

c. The possession, acquisition or use of funds by any person who knows, should have known or there are reasonable grounds on such evidence to believe that such funds are the proceeds of crime.

Section 5 of the Money laundering prevention Act, 2064 has allowed to proceed the legal action in accordance with the Act. It provides any acts, provided in the sub-section (3) or (4), committed in foreign countries or territories and deemed to have committed an offense under the law of such countries, has been deemed to have an offence of money laundering and financing terrorism in Nepal. So, in the instant case Mr. Jugal Nepali, has been, of course committed in Makau, deemed to have been committed the money laundering in Nepal.

Question No. 5:

Money Laundering Prevention Act, 2064 has been enacted to prohibit the money laundering and terrorist financing. This Act has punished any person committing the offence of money laundering or terrorist financing irrespective of the person's residence. State the acts which are considered as offence under the Act.

(Dec, 2019) (7 marks)

Answer:

Chapter-2 of the Asset (Money) Laundering Prevention Act, 2064 prescribes the provisions relating to the nature of the offences under the Act. It prescribes an act as an offence where the money is laundered and the financing money in act of terrorism.

According to Section 3, money laundering is prohibited. The Act prescribes the committing or cause to do following act as offences:

(a) Converting and transferring property by any means knowing or having reasonable grounds to believe that it is proceeds of crime for the purpose of concealing or disguising the illicit origin of property, or assisting any person involved in the offence for evading legal consequences of offender.

(b) Concealing or disguising or changing the true nature, source, location, disposition, movement or ownership of property or rights with respect to such property knowing or having reasonable grounds to believe that it is proceeds of crimes.

(c) Acquiring, using, possessing property knowing or having reasonable grounds to believe that it is the proceeds of crime.

(d) Conspiring to commit, aid, abet, facilitate, counsel, attempt, associate with or participate in the commission of the acts mentioned above.

In other words anyone who is engaged or involved in the act of concealing or hiding money believed earned in an illicitly through offence or to hold money earned such money with a view to protect anyone who is involved in an act of offence.

Accordingly Section 4 prohibits financial investment in act of terrorism by making such act as an offence.

Under this provision it has been prohibited to attempt, support or provoke others to commit offences stipulated above.

Section 4 of the Act also prescribes the condition when it is considered as investment in the act of terrorism. According to the section, No person shall, by any means, directly or indirectly, unlawfully and willfully, provide or collect funds with the intention that they should be used or in the knowledge that they are to or intended to be used, in whole or in part, in order to carry out a terrorist act, or by a terrorist or a terrorist organization. Moreover, no person shall, by any means, directly or indirectly, provide or conspire to provide material support or resources to any terrorist or terrorist organization or in order to carry out a terrorist act.

For this purpose, in case anyone has committed any act supposed to be an offence under the various international conventions relating to terrorist activities or provided or collected any money by any means for terrorizing knowingly or with grounds that such money is being used for committing such offence, he/she shall be supposed to have invested in terrorist activities.

Question No. 6:

Prevention of money laundering becomes totally successful when investigation and inquiry process is carried out properly by an appropriate investigation officer. State the provisions relating to investigation and inquiry under the Money Laundering Prevention Act, 2063.

[June, 2019](6 Marks)

Answer:

Chapter – 6 of the Money Laundering Prevention Act, 2063 prescribes Provision Relating to *Investigation and Inquiry* under the Act. Investigation and inquiry is a most important part in respect of fulfilling the objective of the Money Laundering Prevention Act, 2063. It is the investigation process, by which it is possible to bring and action against the culprits of assets laundering.

1. Pursuant to S. 13 it is required to make Complaint regarding information of the offence. According to it any one of the person, who has information regarding an offence under this Act, may submit a complaint, application, to the Department in written or oral form. The Department on obtaining the information will register the complaint, application so received. As per Sec. 14 the Department will conduct necessary investigation and inquiry After receiving the application or information regarding the offence. In the course of investigation and inquiry, where there is risk of absconding or destroying the evidence or document, taking control of any document or asset by the person committing an offence, the Department may arrest the person involve in it, and may take control of such relevant evidences and assets at place where offence was committed or being committed. The Department may obtain opinion of government attorney in this respect.
2. On receipt of the complaint the Department may appoint or designate any officer of the Department or other officer as an investigation officer, in order to conduct investigation and inquiry of the offences under this Act and designate other staff as required.
3. Pursuant to Section 16 the functions, powers and duties of the investigation officer, appointed or designated will be as follows:-
   a. To take necessary action by arresting the offender (suspect) immediately,
   b. To conduct search or cause to conduct search operation of any office, residence, building, storage, vehicles or of any place in the course of investigation and inquiry,
   c. To exercise other powers vested to the Department.

The investigation officer, while proceeding necessary action may keep the offender (suspect) on date, release him by obtaining bail or guarantee or keep under custody with the permission of the court if he/she fails to provide bail or guarantee.

As per Sec. 17, the investigation officer may detain the person against whom proceedings have been initiated as per this Act, if there is risk of extinct or destroy any evidence or create obstacles or perverse effects in the proceedings of investigation and inquiry according to the prevailing law of the nation. While detaining the person committing an offence It must be obtained prior approval by fulfilling required legal formalities before the adjudicating officer. However, the detainee will not be exempted from making a petition for his release with reasons thereof.

Question No. 7:

Mr.'X' has a saving account in a commercial bank of Nepal with the balance of Rs. 10 Crore. There is a complaint that he has earned that amount from Hundi and other illicit business. Mr. X's plea is that the sources of such amount are credit amount, land selling amount, salary of father, agricultural income of joint family, and that the evidence of such sources of amount has been provided. Now observing the facts in issue, answer whether the Money Laundering Prevention Act, 2064 can criminalize that amount of money as the laundered money or not? Do you find any criminal act involved in this case? Explain

[December, 2018](7 Marks)

Answer:

The Money Laundering (Prevention) Act, 2064, with its amendments, has under section 3 criminalizes the following acts as the money laundering offence:

Nobody shall commit or cause to commit the following acts:

a) The conversion or transfer of property, knowing that such property is derived from any offence for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions;
b) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property knowing that such property is derived from an offence and;
c) The acquisition, possession or use of property, knowing at the time of receipt that such property was derived from an offence.

Section 28 of the above Act, requires an accused under this Act, to prove his sources of property. Accordingly, in case the assets of the person sued for an offence under this Act is found to be unnatural in comparison to his income source or financial condition or he is living a life unnaturally high in standard or proved to have donated, granted, gifted, provided loans, contribution or endowment more than his capacity, he is required to prove the sources of earnings and in case he fails to prove so he shall be deemed to have earned such assets by committing offences under this Act. Such property not proved its sources shall be seized.

In the given case, he has been charged for the offence of money laundering. He has that amount of money in his bank account and claims that he would prove its legal sources. He submits the sources of that amount like land selling amount, salaries of the father, agricultural income and credit taken from various individuals. On the basis of such sources of the amount deposited in the bank he pleads that he is not an offender of an offence of money laundering. However, the sources of fund should be thoroughly investigated under Chapters 5 and 6 of this Act that whether the sources of amount and the documents as its evidence submitted are fictitious or imaginary or he is concealing the illicit origin of that property or not before reaching to any decision.

Question No. 8:

Government of Nepal has enacted Money Laundering Prevention Act, 2064 for the prevention of laundering of money (assets) earned through criminal proceeds. What activities are considered as money laundering offence under the Money Laundering Prevention Act, 2064?

[June, 2018](6 Marks)

Answer:

Principally an offence refers to an act done against the state. In other words, it refers to do an act which has been forbidden by law or prohibited by the prevailing law of the nation. In this context Government of Nepal has enacted an Act to prevent Laundering of criminally earned money (assets).

The Money Laundering Prevention Act 2064 (Second Amendment 2070) has prescribed money laundering as an offence. According to Section 3 of the Act, no person should commit or cause to commit in any of the following acts:-

(a) Converting or transferring property by any means knowing or having reasonable grounds to believe that it is proceeds of crime for the purpose of concealing or disguising the illicit origin of property, or assisting any person involved in the offence for evading legal consequences of offender.

(b) Concealing, disguising or changing the true nature, source, location, disposition, movement or ownership of property or rights with respect to such property knowing or having reasonable grounds to believe that it is proceeds of crimes.

(c) Acquiring, using or possessing any property knowing or having reasonable grounds to believe that it is the proceeds of crime.

The Act further clarifies that no person shall conspire to commit, aid, abet, facilitate, counsel, attempt, associate with or participate in the commission of the acts mentioned above.

Where any person who commits any act mentioned as above amounts to commitment of the offence of money laundering.

Question No. 9:

What is money laundering? Explain the stages involved in money laundering.

[December, 2017](5 Marks)

Answer:

Money laundering is the process of taking dirty funds and converting it into clean funds. Dirty funds are criminally derived proceeds which are then converted into other assets so that they can be reintroduced into legitimate commerce in order to conceal their true origin or ownership clean funds.

There are there stages in money laundering:

a) Placement:

The first stage of money laundering is when the individual participating in criminal activity places cash proceeds into the financial system. This is done so that they can get rid of the cash that is derived from criminal sources. It can be unsafe for people to hold onto a large amount of cash at one time, so they may try to dump the cash somewhere that provides greater security. This stage corresponds to the greatest degree of vulnerability for the criminal. Financial officials are on the lookout for suspicious transactions that are cash based.

The criminal may try to bypass threshold reporting regulations, such as those that require bank officials to report any transactions over a certain amount to Nepal Rastra Bank. This is often done by exchanging illegal funds in smaller and less conspicuous amounts. The funds may be exchanged for other liquid forms of cash, such as traveler cheques, bank draft or savings account.

b) Layering:

The next stage of money laundering attempts to separate the money from its original, illegal source. This part of process is often complicated. By moving the money quickly and to different areas, the money may be transformed so that it is not detected through audits. During this stage, the money may be transferred between multiple countries. The money may take the form of various investments and move faster than regulator can in response.

c) Integration:

This the final stage of the money laundering process. This involves the process to get the funds back to the criminal from what seems to be reputable source. After placing and layering the cash into the financial system, the funds become integrated. In this manner, the criminal can receive funds from their original illegal source in methods that do not draw attention to the situation. This may include receiving money from a business purchased by the funds, such as a restaurant, department store, car wash or laundry business. This business may carefully follow all other regulations in order to avoid detection, such as carefully paying all employee and business taxes and filing tax returns on a timely basis.

Question No. 10:

Explain the Function, Responsibilities and Powers of the Financial Information Unit under the Assets (Money) Laundering Prevention Act, 2064.

[June, 2017](5 Marks)

Answer:

In pursuance to section 9 of the Assets(Money) Laundering Prevention Act, 2064 inclusive of its Second Amendment, the Financial Information Unit (FIU) shall be established as a Department in Rastra Bank with functional independence and autonomy to receive suspicious transaction reports and other information related to money laundering , terrorist financing and predicate offences and analyze suspicious transactions and other information and to disseminate the results of such analysis to the Department.

Pursuant to Section 10 (1) of this Act, the various functions, responsibilities and powers in addition of others of the Financial Information Unit can be listed as under:

a) To obtain particulars of transaction of the limit or excess to it prescribed by this Act.
b) To obtain report related to suspicions transaction as prescribed by this Act.
c) To obtain particulars related to currency and holder negotiable instrument
d) To obtain other information, documents and particulars as per this Act
e) To analyze suspicious transaction report including other reports obtained as per this Act
f) After analyzing pursuant to clause (e), if it appears doubtful that offence relating to financial investment in money laundering and terrorist activities or other offences, to communicate self or at request of concerned authority to the department or entity investigating offence pursuant to prevailing law
g) To manage training for informant unit having liability to communicate information pursuant to this Act, affiliated entities, regulatory bodies and own employees as per necessity
h) To guide informant unit or affiliated entities relating to identification of suspicious transaction, report related to suspicious transactions and information as well.
i) To submit annual report to the Government of Nepal through Nepal Rastra Bank attaching particulars of offences types, technology, method and practice of offences relating to the financial investment in money laundering and terrorist activities.
j) To assist the regulatory body for inspecting informant units as per necessity relating to identification, evaluation, report system of suspicious transaction and its effectiveness.
k) To maintain understanding with same nature foreign entity relating to exchange of assistance on the basis of reciprocity.
l) To perform other activities as prescribed

Question No. 11:

Tarahara, a newly operated commercial bank, wants the standard procedures to identity their valued customers as per the provisions of money laundering Prevention Act, 2064. Explain.

[December, 2016](7 Marks)

Answer:

As per the provision of Money Laundering Prevention Act, 2064, chapter 3, all commercial banks including Tarahara should identify their customers as prescribed by Nepal Rastra Bank following the below mentioned procedures to obtain the information.

1) Any bank, financial institution or nonfinancial institutions shall maintain clear identity of a person while establishing any kind of business relationship with him/her or transacting the amount more than the limit at one or several transactions as prescribed by Rastra Bank from time to time by publishing notice.
2) Bank, financial institution or non-financial institution, while getting identification of the customer, shall require the person establishing business relationship or having transactions with it to submit the documents as follows:-

a) In case of a natural person his/her name, family surname, copy of citizenship or passport including other necessary documents evidencing his/her permanent residential address and profession or business,
b) In case of the person or firm except provided in Clause (a), copy of the document certifying incorporation, establishment or registration of the institution, documents that presenting name, surname, address, profession, business of board of directors and executive director or proprietor of firm or partners of partnership firm,
c) In case of business relation or transactions to be established or made on behalf of someone else, documents relating to principal's identity, address including power of attorney clarifying his/her business,
d) Name, surname, address of close relative, person or institution benefiting from the transaction of the business relationship,
e) In case of transactions made through negotiable instruments, name, surname and address of the issuer and payee of or from such instrument,
f) Other documents as prescribed by the Financial Information Unit from time to time.

3) Bank, financial institution or non-financial institution shall keep a separate record of document and transactions of each customer, including date and nature of transactions, type of account if any and symbol number.

CHAPTER-14

PUBLIC PROCUREMENT ACT, 2063 AND RULES 2064

[Note: All answers suggested hereby have been updated as per Public Procurement Act, 2063 with First Amendment, 2073 and Some Nepal Acts Amending Act, 2075]

Question No. 1:
Irrigation Office of Jumla has prepared cost estimate for the construct of cannel in Tila river. The total cost of the project comes to Rs. 20 million and the office in charge (third class officer) has approved the cost estimate. Whether a third class officer can approve the above cost for the construction of cannel in Tila river is questioned by the Irrigation Division Office, Surkhet. You as a procurement consultant advise the officer the fact as mentioned in the procurement rules 2064 on the authorization to approve the cost estimate of the project referring the various provisions of the Rules. **(June 2022) (8 Marks)**

Answer:
Rule 14 of the Public Procurement Rules, 2064 has defined the approval of cost estimate as follows:

1. A cost estimate prepared pursuant to Rules 10, 11 and 13 has to be approved by the following authority:
    a. The cost estimate that does not exceed ten million rupees, by the gazetted third-class chief of office,
    b. The cost estimate that does not exceed fifty million rupees, by the gazetted second-class chief of office,
    c. The cost estimate that does not exceed one hundred million rupees, by the gazetted first-class chief of office,
    d. The cost estimate that exceeds one hundred million rupees, by the head of department.

2. The cost estimate prepared pursuant to Rule 12 has to be approved by the following authority:
    a. The cost estimate that does not exceed one million rupees, by the gazetted third-class chief of office,
    b. The cost estimate that does not exceed two million five hundred thousand rupees, by the gazetted second-class chief of office,
    c. The cost estimate that does not exceed five million rupees, by the gazetted first-class chief of office,
    d. The cost estimate that exceeds five million rupees, by the head of department.

3. If the chief of the public entity himself or herself cannot approve the cost estimate pursuant to this Rule or the description referred to in Rule 5A., he or she shall cause such a cost estimate or description to be approved by one level higher authority.

4. Notwithstanding anything contained elsewhere in this Rule, the secretary or administrative chief of a constitutional organ or body, Ministry, secretariat and other

office of similar nature may approve the cost estimate of any amount whatsoever for the procurement to be made for his or her office.

Question No. 2:
Gautam Buddha International Airport had published a bid for construction of a terminal building on 2078 BS. S and S JV submitted a bid with other four companies. Those bids were opened and submitted before bid examination committee. You are appointed as a consultant of public procurement and invited you in the meeting. What are the processes of bid examination as mentioned in the Public Procurement Act, 2063 (PPA)? Prescribe to the Committee. **(June 2022) (7 Marks)**

Answer:
Bids are examined with compliance of the process as mentioned in the section 23 of Public Procurement Act, 2063. The public entity shall open the bids submitted to Bid Evaluation Committee. The Committee shall, prior to evaluating the bids submitted pursuant to sub-section (1) of Section 23, examine the bids and ascertain the following matters:

(a) Whether the documents establishing that the bidder is qualified under law to submit the bid have been submitted or not,
(b) Whether the bid is complete in accordance with the instructions to bidders set forth in the bidding documents or not, and whether it is signed by the bidder or by the bidder's authorized agent or not,
(c) Where a bid security is required to be submitted along with the bid, whether the bid security of such type, period and amount as set forth in the bidding documents is accompanied with the bid or not,
(d) Whether the bid is substantially responsive to the technical specifications set forth in the bidding documents and to the terms and conditions of procurement contract attached with the bidding documents or not.

The committee shall examine the completeness of the bid pursuant to clause (b) of sub-section (2) of Section 23 and the following matters shall be examined (Section 23(3)):

a. Whether a power of attorney for the authorized agent or local agent of the bidder has been submitted or not,
b. Where a joint venture agreement is necessary, whether such an agreement has been submitted or not,
c. Whether the documents substantiating the eligibility of the bidder and of the goods mentioned by the bidder have been submitted or not,

d. Whether the necessary documents relating to the qualifications of the bidder have been submitted or not,
e. Where the bidding documents require the submission of a rate analysis, whether such a rate analysis has been submitted or not,
f. Other matters as prescribed.

Other process (Section 23 (4) to (10)):

- Ask the bidders for necessary information.
- The concerned bidder shall provide the information sought by the public entity without any change or alteration in the bid price or other substantial matters of the bid shall be allowed.
- It shall be examined whether the qualification of the bidder conforms to the prequalification or not.
- If the qualification of a bidder is found to be substantially lower than the qualification which was at the prequalification stage, the bid of such a bidder shall be rejected.
- If any arithmetical error is found in a bid, the public entity may correct such an error, and where, in making such correction, there exists a discrepancy between the unit rate and the total amount, the unit rate shall prevail, and the total amount shall be corrected as per that rate.
- Where there is a discrepancy between the amount mentioned in figures and that in words by the bidder in a bid, the amount in words shall prevail.
- Where any error is corrected pursuant to sub-section (8) or (9), information of such correction shall be given to the concerned bidder.

Question No. 3:

Due to Pandemic of COVID-19, the Health Ministry of Nepal Government would like to purchase essential vaccine and equipment to tackle the situation. Normal procedure to buy vaccine and equipment takes almost 6 months due to the legal formalities to be fulfilled on the basis of public procurement laws. Health Minister then consulted you to find the fastest way to get vaccine and equipment to control the pandemic situation. Do you think is there any exception not to follow the normal procedure mentioned in the Public Procurement Act, 2063 and Regulations. Advise to the Health Minister about the special circumstances where public entity can procure goods and services in the fastest way as per the law. **(December, 2021) (7 Marks)**

Answer:

When special circumstances occur, public entity can procure the goods and services in the fastest way. Inthis situation, no formalities to be followed, however, it has to abide by the section 66 of the Public Procurement Act and Rule 145 of the Public Procurement Regulation.
Section 66 of the public procurement Act, 2063 mentions about the procurement in the special circumstances which is as follows:

(1) Notwithstanding anything contained elsewhere in this Act, if the occurrence of a special circumstance results in the situation where the public entity will sustain further loss, damage if procurement is not made immediately, the public entity may make, or cause to be made, procurement immediately.

(2) The chief of the public entity shall give information of the circumstance referred to in sub-section (1) and detailed description about the procurement to be made immediately to the one level higher authority.

(3) Other provisions relating to the procurement to be made in a special circumstance shall be as prescribed.

Rule 145 of Public Procurement Regulation 2064 mentions that:

(1) A public entity shall, in making procurement pursuant to Section 66 of the Act, prepare written details of the procurement requirements, quality, quantity, conditions and period for the completion of work and shall procure only the quantity and for the period required to face the emerging circumstances by having competition made as far as practicable or by concluding negotiations for fair and proper price after receiving written quotation or proposal from a single construction businessperson, supplier, consultant or service provider.

(2) Where procurement has been made pursuant to sub-rule (1) above, the documents setting out the following matters shall be kept in the records referred to in Rule 149 of this regulation:

(a) Description relating to special circumstances,

(b) The crisis that may occur in public security, interest and community health, if procurement is not made immediately,

(c) The reason and ground why the other methods of procurement cannot be applied.

(3) Where a Public entity has made a procurement exceeding one million Rupees pursuant to sub-rule (1) it shall publish a public notice of the details of the procurement so made and send information thereof to the Public Procurement Monitoring Office.

(3a)In cases where the office referred to in sub-rule (1) has not been established, the central level public entity referred to in sub-clause (1) of clause (b) of Section 2 of the Act may

procure essential pharmaceuticals and such Masalanda or stationery required for the operation of the office through open bidding. Model of the bidding documents relating to such procurement proceeding and framework contract shall be as approved by the Public Procurement Monitoring Office.

Question No. 4:

A public entity wishes to go for bid to construct a new training hall and sell old vehicles. Chief of that entity asks you to prepare bidding documents. Mention what are the matters (particulars) to be included in the bidding document under the Public Procurement Act, 2063?

(June, 2021) (7 marks)

Answer:

Section 13 of Public Procurement Act, 2063 mentions that a public entity shall have to prepare bidding documents which covers the following matters:

(a) The nature of procurement, time required for procurement and technical specifications thereof,

(b) Where bids are invited without carrying out prequalification, the criteria for qualification of bidders, as referred to in Section 10,

(c) Where there is provision of site visit, information relating thereto,

(d) If any bid conference has to be held prior to submission of bid, information relating to such conference,

(e) Instructions for preparing and submitting bids, the place for the submission of bids, the deadline for the submission of bids and the place, date and time for the opening of bids,

(f) Component of price, the currency or currencies in which the bid price may be stated, the currency and the source and date of the related exchange rate to be used for comparison of bids,

(g) The criteria and methodology for the evaluation of bids and the selection of bidder,

(h) The preferences to be given, if any, for domestic goods and local construction entrepreneurs, provision relating thereto,

(i) Where any goods or construction works are to be procured by making separate lots and packages, such lots and packages and the manner of evaluation thereof,

(j) Where alternatives to the technical specifications are also invited, the manner of evaluation of such alternatives,

(k) Where a bid can be submitted even only for a portion of the goods, construction works or services to be procured, a description of such portion or portions,

(l) The validity period of bid,

(m) The amount, type, acceptable form and validity period of security to be furnished for bid, performance or other necessary matters,

(n) Where a bid security is required, provision that the period of that security shall exceed by thirty days to the validity period of bid,

(n1) If a bidder has proposed and accepted a bid upto 15% less than the estimated cost, then bidder/contractor has to deposit 5% performance bond (guarantee) amount. Similarly, if a bidder has accepted a bid with more than 15% less than the estimated cost, then he/she shall deposit extra 50% of such short amount.

(o) The terms and conditions of the procurement contract under Section 52 and the modality of coming for the entry into force of that contract,

(p) Information that bids shall not be processed in the event of conflict of interest or information relating to legal action for fraud or corruption,

(q) Provision that any bidder may make an application, for review, against any error or decision made by the Public Entity in carrying out bid proceedings,

(r) Provision that the documents proving technical capacity and financial proposal (bid price) have to be submitted in one envelope, and

(s) Such other matters determined by the Public Procurement Monitoring Office as to be involved in the prequalification documents or bidding documents.

The Public Entity shall make available the bidding documents upon collection of the charges as prescribed to any person, firm, organization or company that requests for the bidding documents in accordance with the notice for invitation to bids, and where prequalification is required to participate in the procurement proceedings, to those persons, firms, organizations or companies that have been pre-qualified and request for such documents.

Question No. 5:

Mention the circumstances where international bidding can be published in order to procure the goods and services as per the Public Procurement Act, 2063.

(Dec, 2020) (5 marks)

Answer:

Section 15(1) of Public Procurement Act, 2063 has mentioned various circumstances (criteria) where public entity shall make an international bidding. These circumstances are as follows:

(a) If the goods or construction works as requisitioned by a public entity are not available at the competitive price from more than one construction entrepreneur or supplier within the State of Nepal,

(b) If no bid has been submitted in response to an invitation to national bidding for the procurement of goods, construction works or other services, and the same has to be procured from abroad,

(c) If foreign goods or construction works have to be procured through the foreign assistance source pursuant to the agreement entered into with a donor party,

(d) If it is certified by the public entity that the goods or construction works, being of complex and special nature, have to be procured through international bidding.

A notice on invitation to international bidding referred to in this Section shall be published in the English language, and all bidding or prequalification documents shall be made available in the English language.

The notice referred to in sub-section (2) above of this Act shall be posted in the website referred to in sub-section (2) of Section 14.

Question No. 6:

Town Development Department purchased Furniture for the Home Ministry from Kamana Furnishing Solutions Pvt. Ltd. at sum of Rs. 10,00,000.00 (Rs. Ten Lakh). The given Public Entity had purchased the furniture applying the force account method. Shree furnishing Pvt. Ltd. questioned the method and requested to cancel the procurement works regarding the overlapping the amount limitation and applying procurement method otherwise. Supply the Procurement method on goods as provided in the Public Procurement Act, 2063 and Ensure the validity of the force account procurement method in above transaction.

(Dec, 2019) (6 marks)

Answer:

The Public Procurement Act, 2063 (PPA) (with amendment 2073), Section 8(1)(a), has mentioned the methods of procuring any goods by any Public Entity. They are as follows:

1) By inviting open bids at international level,
2) By inviting open bids at national level,
3) By inviting sealed quotations,
4) By procuring directly,
5) Through participation of users' committee or beneficiary group,
6) Through force account.
7) Whole sale rate technique.
8) Catalogue shopping technique.
9) Limited Tendering that can be participate in bid by limited bidders.
10) Buy Back Method in which new goods purchased and old one returned to the seller.

Regarding above force account method transaction the amount limitation is Rs 5,00,000 (five lakhs) only. More than the amount, other methods like sealed quotation and so on methods shall be applied during the procurement of the goods and alike. However, the transaction limit

shall be over till the amount of 20 Lakhs for procuring medicine and till the 15 Lakhs for procuring the goods of Nepalese origin. These extra transaction limitations shall be not be applied for the furniture as said in above. Therefore, the procuring the furniture applying the force account method of procuring is wrong and should be cancelled by the concerned authority.

Question No. 7:

State the process of examination of bid by the public entity as per the Public Procurement Act, 2063, where the goods are purchased through the bidding process.

[June, 2019](7 Marks)

Answer:

On receipt of the bid documents, the Public Entity shall have to open bids as prescribed at the time and place specified in the bidding documents on the same day immediately after expiry of the deadline for the submission of bids as per Section 22 of the Public Procurement Act, 2063.

According to Section 23 the bid opened pursuant to Section 22 should be submit to the evaluation committee by the Public Entity.

Under Section 23(2) the committee should, prior to evaluating the bids submitted pursuant to Sub-section (1), examine the bids in order to ascertain the following matters:-

a) Whether documents establishing that the bidder is qualified under law to submit the bid are submitted or not,
b) Whether the bid is complete in accordance with the instructions to bidders set forth in the bidding documents or not and whether it is signed by the bidder or by the bidder's authorized agent or not,
c) Where a bid security is required to be submitted along with the bid, whether a bid security of such type, period and amount as set forth in the bidding documents is accompanied with the bid or not,
d) Whether the bid is substantially responsive to the technical specifications set forth in the bidding documents and the terms and conditions of procurement contract attached with the bidding documents or not.

Under subsection (3) in examining the completeness of bids pursuant to clause (b) of Subsection (2), the following matters shall be examined:

a) Whether a power of attorney for the authorized agent or local agent of the bidder is submitted or not,
b) Where a joint venture agreement is necessary, whether such agreement is submitted or not
c) Whether documents establishing the eligibility of the bidder and of goods mentioned by the bidder are submitted or not,
d) (d) Whether necessary document relating to the qualifications of the bidder is submitted or not,
e) (e) Where the bidding documents require the submission of a rate analysis, whether such rate analysis is submitted or not

f) (f) Other matters as prescribed.
(4) The Public Entity may ask bidders for necessary information.
(5) The concerned bidder should have to provide the information sought by the Public Entity without allowing any change or alteration in the bid price or other substance of the bid.
(6) In examining bids bidder shall be made to ascertain whether or not it conforms to the prequalification or not.
(7) While examining the qualification pursuant to Sub-section (6), if the qualification of a bidder is found to be substantially lower than what was at the prequalification stage, the bid of such a bidder shall be rejected.
(8) If any arithmetical error is found in a bid in examining bids the Public Entity may correct such an error, and where, in making such correction, there exists a discrepancy between unit rate and total amount, the unit rate shall prevail, and the total amount shall be corrected as per the same rate.
Where there is a discrepancy between figures and words in a bid submitted by a bidder, the amount in words shall prevail.
(10) Where any error is corrected pursuant to Sub-section (8) or (9), information of such correction shall be communicated to the concerned bidder.

Question No. 8:
Irrigation Department of Government of Nepal purchased Dell Laptops from Easy Trade Pvt. Ltd. at the sum of Rs. 1,000,000. The Department had purchased the laptops applying the force account method. Busy Suppliers Pvt. Ltd. questioned the method and requested to cancel the procurement works regarding the overlapping of the amount limitation. State the Procurement method on goods as provided in the Public Procurement Act, 2063 and ensure the validity of the force account procurement method in the above transaction

[December, 2018](6 Marks)

Answer:
Section 8(1) of the Public Procurement Act (PPA), 2063 with amendment 2073, has provided for the following methods of procuring any goods by any Public Entity:
11) By inviting open bids at international level,
12) By inviting open bids at national level,
13) By inviting sealed quotations,
14) By procuring directly,
15) Through participation of users' committee or beneficiary group,
16) Through force account.
17) Whole sale rate technique.
18) Catalogue shopping technique.
19) Limited Tendering (bid can be participated by limited bidders).
20) Buy Back Method in which new goods purchased and old one returned to the seller.

Regarding above force account method transaction the amount limitation is Rs. 5,00,000.00 Lakhs only. For the procurement exceeding to that amount, other methods like sealed quotation and others could be applied. However, the transaction limit shall be over till the amount of 20 Lakhs for procuring medicine and till the 15 Lakhs for procuring the goods of Nepalese production. These extra transaction limitation shall not be applied for the Dell Laptop as said above. Therefore, the procuring of the Dell Laptop applying the force account method of procurement is wrong under section 45 of the Public Procurement Act, 2063 and should be canceled by the concerned authority.

Question No. 9:

State the matters to be mentioned in the notice on invitation to bid or prequalification proposal under the Public Procurement Act, 2063.

[June, 2018](7 Marks)

Answer:

1) It is essential as per the Section 14 (1) of the Public Procurement Act, 2063 that a notice for invitation to bids or prequalification proposals shall have to be published in a daily newspaper of national circulation and, in the case of an international bid; it may also be published in any international communication media as well.
2) Section 14(2) also provided on such matters about the publication of bid notice. Such notice shall be published in the website of such entity and Public Procurement Monitoring Office (PPMO) if such notice is concerned to the Central level Public Entity. Further, such notice, concerning the District level Public entity, shall be published in the website of such entity or Public Procurement Monitoring Office (PPMO).
3) Pursuant to Sub-section (3) of Section 14, the notice on invitation to bid or prequalification proposal shall contain the following matters:-
   a. The name and address of the Public Entity inviting bid,
   b. The nature of and time limit for procurement work and the place of delivery of the goods to be supplied, the services to be delivered and the construction work to be performed,
   c. If bid security is required, the amount and validity period thereof.
   d. Where bid security is required, the validity period of the bid
   e. The place, manner of obtaining the bidding documents or prequalification documents and the fees charged therefor.
   f. The place, manner, the deadline for the submission or forwarding of the bidding documents or prequalification proposal.
   g. The place, date and time for the opening of bids or prequalification proposals and matter that the bidders or their authorized agents shall be invited to attend the opening of bid.
   h. Other matters as prescribed.

Question No. 10:

An appellate court published seven days' notice for supplying the special Nepali brand paper made files to the court within one and half month, for which sealed quotation be submitted before the court. Accordingly, quotations were submitted within the dead line. The court opened the quotations and made the decision, but one of the applicants was not satisfied with the decision

ii) What is the remedy available to the dissatisfied applicant?
iii) On what grounds petition may be filed?
iv) On what situation such decision may be suspended?

[December, 2017](5 Marks)

Answer:

i. As per section 47(1) of the Public Procurement Act 2063, a bidder or proponent may file an application before the chief of the concerned public entity for review against any error or decision made by the public entity stating the cause for the damages the bidder will suffer or is likely to suffer from the error breach of the duty, imposed on the public entity in carrying out the procurement proceedings or making decision.

The application to be filed pursuant to sub-section 1 shall be limited with respect to the proceedings prior to entry into force of the procurement contract.

The application shall have to be filed within the period specified, if any, in this act for making application and, if not so specified, within seven days from the date of the bidder or proponent having become aware of that the public entity has made an error or has dishonored the duty relating the procurement proceedings.

ii. The petition may be filed on the ground that there were irregularities while making the decision. Accordingly, if the breach of duty is seen, and irregularities were made which resulted for his loss are to be established. The application shall have to state clearly the commission or omission of any act by the public entity that led error or breach of duty and the provision of this act or regulations or guidelines made thereunder that have been contravened by such decision.

iii. Section 47 of the Public Procurement Act, 2063 with amendment makes the provision that if the decision was made due to irregularities, breach of duty was seen and activities found against law, the decision should be suspended the procurement proceedings and make a decision with reason in writing within five days of receipt of such application. The decision as above shall also state how the procurement proceedings shall further proceed on.

If the application is in respect of the procurement proceedings of an amount below the prescribed one, no application can be submitted before the review committee for review against the decision made by the chief of the public entity pursuant to this sub section.

Question No. 11:

Identify the steps to be undertaken by public entity before placing order for procurement of goods pursuant to the Public Procurement Act, 2063 and Public Procurement Rules 2064.

[June, 2017](5 Marks)

Answer:

Section 3 of the Public Procurement Act, 2063 requires public entity to comply the procedures set out in this Act before placing order for procurement of goods. Under Section 4, the public entity prior to procuring goods shall have to prepare specifications, plan, drawing, design, special requirements or other descriptions pertaining thereto. The description shall be prepared on the basis of relevant objective technical and quality characteristics and functions of such goods. In preparing the description of goods, a particular brand, trademark, name, patent, design, type, origin or producer's name cannot be mentioned.

Under Section 5, while procuring the goods, it is compulsory to make the cost estimate of the goods if the value of such procurement is more than rupees 25 thousand. While preparing cost estimate, the procurement unit will consider actual cost incurred in the procurement of the same nature by the concerned public entity or another public entity in the district where such public entity is situated in the current year or in previous years. Also the procurement unit consider the rate prevailing at the local market, rate prevailing at other market and estimated transportation costs to the place of delivery of goods, also compare the rate issued by the chamber of commerce and industry of the country.

The cost estimate prepared pursuant to Rules 11 has to be approved by the concerned authority as prescribed in the rules.

A public entity shall in making procurement valued at an amount in excess of the prescribed limit, have to prepare a master procurement plan and annual procurement plan, as prescribed undertake such activities. Public entity shall establish a procurement unit and the unit will do the following works before placing the order of goods.

- Prepare public procurement plan
- Prepare prequalification documents, bidding documents and procurement contract related documents by making necessary amendments in the standard bidding documents, standard prequalification documents and standard procurement contract documents prepared by the public procurement monitoring office.
- To coordinate activities relating to procurement proceedings
- To collect procurement requisitions and submit the same to the competent authority for approval.

A public entity should select procurement methods before issue the public notice. There are various methods of procurement like international bidding, national level bidding, sealed quotation and direct procurement.

Question No. 12:

How the evaluation committee examines the bids in order to ascertain whether the bid documents as submitted by the bidder has comply with the provisions of Public Procurement Act, 2063?

[December, 2016](7 Marks)

Answer:

Section 23 of the Public Procurement Act, 2063 has explained the matters to be conformed while evaluating the bids documents as follows:

Subsection (1) of the act said that the Public Entity shall have to submit to the evaluation committee the bids opened pursuant to Section 22. And the committee under sub section (2) shall, prior to evaluating the bids submitted pursuant to Sub-section (1), examine the bids in order to ascertain the following matters:

a. Whether documents establishing that the bidder is qualified under law to submit the bid are submitted or not,
b. Whether the bid is complete in accordance with the instructions to bidders set forth in the bidding documents or not and whether it is signed by the bidder or by the bidder's authorized agent or not,
c. Where a bid security is required to be submitted along with the bid, whether a bid security of such type, period and amount as set forth in the bidding documents is accompanied with the bid or not,
d. Whether the bid is substantially responsive to the technical specifications set forth in the bidding documents and the terms and conditions of procurement contract attached with the bidding documents or not.

As per section 23(3), in examining the completeness of bids pursuant to clause (b) of Subsection, the following matters shall be examined:-

a) Whether a power of attorney for the authorized agent or local agent of the bidder is submitted or not,
b) Where a joint venture agreement is necessary, whether such agreement is submitted or not,
c) Whether documents establishing the eligibility of the bidder and of goods mentioned by the bidder are submitted or not,
d) Whether necessary document relating to the qualifications of the bidder is submitted or not,
e) Where the bidding documents require the submission of a rate analysis, whether such rate analysis is submitted or not,
f) Other matters as prescribed.

The Public Entity may, in the course of examining the bids pursuant to this Section, ask bidders for necessary information.

In examining bids invited after determination of prequalification, examination of the qualification of bidder shall be made to ascertain whether or not it conforms to the prequalification or not.

If any arithmetical error is found in a bid in examining bids pursuant to this Section, the Public Entity may correct such an error, and where, in making such correction, there exists a discrepancy

between unit rate and total amount, the unit rate shall prevail, and the total amount shall be corrected as per the same rate.

Where there is a discrepancy between figures and words in a bid submitted by a bidder, the amount in words shall prevail.

CHAPTER-15

AUDIT ACT 2075

[Note: All answers suggested hereby have been updated as per Audit Act, 2075]

Question No. 1:
Point out the matters shall be audited by the Auditor General in view of propriety in accordance with Audit Act, 2075. **(December 2022) (5 Marks)**

Answer:

In accordance with section 9 of the Audit Act, 2075 the matters to be audited by the Auditor General in view of propriety:

i) The Auditor General shall, as required, audit the following matters in view of the propriety thereof:
   - If it is seen that any expenditure, though it confirms to the authorization, has been made unreasonably or in a manner to cause loss and damage to the national property, with respect to such expenditure and its authorization,
   - With respect to any grant of national property whether movable or immovable or underwriting of revenue or any lease, permit, license or rights relating to mining, forest, hydropower etc. and all authorizations issued in a manner to abandon any revenue or national property, whether movable or immovable,
   - With respect to the subject-matters of various financial transactions including contracts and agreements relating to public works, repair and maintenance, procurement and supply, consultancy service, service delivery, public expenditure and revenue mobilization.

ii) The Auditor General may, if he or she deems it appropriate, examine, in accordance with the recognized principles of accounting, as to whether or not any official within his or her scope of competence has borne financial accountability.

iii) The Auditor General may not include in his or her report minor items of irregular amounts or other items deemed not to be significant and important in view of their propriety.

Question No. 2:
Auditor General of Nepal has to submit annual report to the President of Nepal under article 294 of the Constitution of Nepal. Explain the matter to be included in the Auditor General Reports referring the provisions of Audit Act, 2075. **(June 2022) (6 Marks)**

Answer:

Section 19 of the Audit Act, 2075 has explained the set of annual report to be submitted by the Auditor General of Nepal to the President pursuant to Article 294 of the Constitution of Nepal. Annual report should cover the followings:

1) The following matters shall be set out in the annual report to be submitted by the Auditor General to the President pursuant to Article 294 of the Constitution:
   a. Details of the functions performed by the Auditor General throughout the year,
   b. Summary of the main contents found from audit,
   c. Status of implementation of the audit reports and reforms to be made in the future,
   d. Other necessary matters.
2) The Auditor General may issue audit reports, along with the opinion, after completion of audits of the bodies referred to in sub-section (1) of Section (3).
3) The Auditor General may, in addition to the matters referred to in sub-section (2), also issue functional, information technology, forensic, gender, environmental and timely audit reports of the bodies referred to in sub-section (1) of Section (3).
4) The Auditor General may prepare individual annual report as to the functions of each Province and submit it to the Chief of the concerned Province.
5) The report submitted pursuant to sub-section (4) shall be submitted to the Provincial Assembly through the Chief Minister.
6) The Auditor General may, if it appears that a significant loss and damage has been caused to any movable or immovable national property or such a loss and damage may occur if immediate action is not taken, audit at any time such transactions and submit a report to the President or Chief of the Province, as the case may be.
7) The report submitted by the Auditor General pursuant to this Section shall be made public.

Question No. 3:

Office of the Auditor General is the Supreme Audit Institution of Nepal. It has specified certain objectives and policies performing its task along with the Audit Act, 2075. Answer the following question in line with the above statement.

i) What are the objectives under the Act?
ii) State the certain matters to be audited by the Office of the Auditor General as per the Audit Act, 2075.

(Dec, 2020) (2+5=7 marks)

Answer:

i) The Office of the Auditor General (OAG) has following objectives under the Act:

- To promote public accountability and transparency;
- To bring forth economy in the mobilization of public resources and enhance efficiency;
- To enhance effectiveness of public entities;
- To improve and assure clean practices in the working system of administrative, financial and managerial system;
- To assist in compliance of the existing laws;

- To encourage abandonment of the discretionary work-style;
- To recommend practical suggestions for improvement by identifying weaknesses and lacunae in the existing approaches, processes, practices and legal provisions; and
- To encourage the practice of taking actions against delinquents and rewarding the excellent performers.

ii) According to Section 8 of the Audit Act, 2075 the Auditor General, with due regard to the regularity, economy, efficiency, effectiveness and propriety, should audit following matters to ascertain whether:

(a) The amount appropriated in the concerned heads and sub- heads by the Appropriation Act for respective services and activities have been expended or not for the specified purposes of designated services or activities within the approved limit,
(b) The financial transactions comply or not with the existing laws and the evidence relating to items of income and expenditure are sufficient,
(c) The constitutional bodies, Ministries, Department and similar central offices, subordinate offices, State ministries and other State offices have maintained the accounts in the prescribed forms or not and such accounts fairly represent the position of the transactions; showing the transaction with clear picture or not,
(d) Federal Reserve fund, State Reserve fund, Local Reserve fund, Federal Emergency fund, State Emergency fund and other government funds have been maintained properly or not,
(e) Concerned governmental authorities have released the budget in time or not,
(f) The financial statement has mentioned the real and clear picture of the financial transactions of the period mentioned thereof or not,
(g) Sufficient evidence pertaining to the accounts of revenue, all other incomes are income and expenditure are correct or not,
(h) The arrangements for internal audit and internal control of cash, kind and other governmental property against any loss, damage and abuse are adequate and if so, are they pursued,
(i) The accounts of revenue, all other incomes and deposits are correct and the rules relating to evaluation, realization and methods of book keeping are adequate and if so, are they followed,
(j) The accounts relating to public debts, security, deposit, debt relief fund and the amounts set aside for debt services and repayment of debts are accurate,
(k) Progress report is there as per the audit report Actual approval of the authority to dispose the budget,
(l) Timely payment and fulfillment of the liability raised thereof,
(m) The available resources, means and assets are properly utilized and the maintenance,
(n) Maintenance and recording of the government property have been as per the existing law or not,

(o) Protection and preservation of the government property preventing them from loss and damage or not,
(p) Proper and adequate maintenance of the books of account relating to the government loan and investment and the money received in terms of capital, interest and dividend of the same have been made or not,
(q) There is availability or not of the adequate controlling legal mechanism to prevent misappropriation of the expenditure and their proper implementation and follow up of the same,
(r) There is availability or not of the effective policy of internal controlling system and follow up of the same,
(s) There is performance of internal auditing satisfactorily or not, and if the report has been implemented effectively or not,
(t) There is timely recovery and deposition of the government revenue in the government fund or not, and effort has been made for controlling leakage of the revenue or not,
(u) There is adequacy of the legal provision relating to the deposit or not and their proper implementation have been made or not,
(v) The organization, management and job allocation of the office are sufficient and proper or not, and are that operating accordingly or not,
(w) Any function is being unnecessarily performed in duplication by any employee or agency or any essential function is being omitted or not,
(x) The progress has been achieved within scheduled time and the quality and quantity of the work is satisfactory or not,
(y) The objective and policy of the Office is explicit and the program is delineated conforming to the specified objective and policy or not.

Question No. 4:

There is a company where majority of the shares are held by the Government of Nepal. The Office of the Auditor General, due to work load, could not undertake its audit. The Company appointed a private auditor with the consent of the Office of the Auditor General for its auditing. Explain the procedure of the appointment and the activities to be followed thereafter by the company and the office of the Auditor General

[December, 2018](5 Marks)

Answer:

As per the Audit Act 2075, following are the procedures of the audit of the corporate bodies where majority of shares owned by the Government of Nepal:

As per section 2(f) of the Act, a corporate body means a corporate body whose more than fifty percent shares or assets are owned by Government of Nepal, Province Government or Local Bodies and the term also means an institution whose more than fifty percent shares or assets are owned by corporate body. Hence, as per section 11(1) of Audit Act 2075, the statutory auditor of the company shall be appointed by the company subject to principle prescribed by the Auditor

General. However, such auditor shall be appointed after consulting the Auditor General [section 11 (2)].

The procedures to be followed while consulting the Auditor General for appointing auditors and on matters of principles of audit to be followed by the auditors during their audit shall be as prescribed by the Auditor General. After the completion of audit, the corporate body shall deliver to the Office of the Auditor General a copy of the audit report submitted by the auditor appointed in consultation with the Auditor General [u/s 11(3)]. The Auditor General may issue directives to the concerned corporate body and auditor in respect of the irregularities observed in the report received and it shall be the duty of concerned organization to abide by such directives [u/s 11(4)].

Question No. 5:

Discuss the legal provisions for the audit of corporate bodies fully owned by government of Nepal

[December, 2017](6 Marks) [Final/December, 2012](5 Marks)

Answer:

Section 3(1)(b) of Audit Act, 2075 mentions about the provision concerning auditing of Corporate Bodies Wholly Owned by Government of Nepal, Province Government or Local Bodies as follows:

As per section 3(1) of Audit Act 2075, following entities shall be audited by the Auditor General:

a) Government Offices,
b) Corporate bodies wholly owned by Government of Nepal, Province Government or Local Bodies
c) Institutions or entities to be audited by the Auditor General as prescribed the federal laws

As per section 2(b) of the Act, Corporate bodies wholly owned by Government of Nepal, Province Government or Local Bodies means a corporate body whose all shares of assets are owned by Government of Nepal, Province Government or Local Bodies or a corporate body whose all shares or assets are owned by the aforesaid corporate body or by such corporate body and Government of Nepal Province Government or Local Bodies and this expression shall also include such corporate body for whom Government of Nepal Province Government or Local Bodies is required to bear full responsibility.

As per section 10(1) of the Act, if the Auditor General is constrained by time and resources to audit the corporate bodies wholly owned by Government of Nepal, Province Government or Local Bodies, as above, he/she may appoint license holder auditors under the prevailing laws an assistant. The auditor appointed as such shall act under the direction, supervision and control of the Auditor General [u/s 10(2)]. The powers, functions, duties and responsibilities of the auditors appointed as such and the procedures to be followed by them in course audit and provisions relating to their report shall be as prescribed by this Act and at its absence as prescribed by the Auditor General [u/s 10(3)]. The remuneration to be paid by the concerned organization to the auditors appointed pursuant to Sub-section (1) shall be fixed by the Auditor General keeping in view the volume of financial transactions, status of accounts, number of branches and sub-branches, work load and work progress of the concerned organization [u/s 10(4)].

Question No. 6:

Functions, duties and powers of the Auditor General.

[June, 2016](5 Marks)

Answer:

Constitution of Nepal, 2072 in its Article 241, provides that the functions, duties and powers of Auditor General as follows:

1) The accounts of all Federal and State Government Offices including the Office of the President, Office of the Vice-President, Supreme Court, Federal Parliament, State Assembly, State Government, Local level, Constitutional Bodies and Offices thereof, Courts, Office of the Attorney General, Nepal Army, Nepal Police and Armed Police Force, Nepal shall be audited by the Auditor-General in accordance with law, having regard to, *inter alia*, the regularity, economy, efficiency, effectiveness and the propriety thereof.
2) The Auditor General shall be consulted in the matter of appointment of an auditor to carry out the audit of a corporate body of which the Government of Nepal or State Government owns more than fifty percent of the shares or assets. The Auditor General may also issue necessary directives setting forth the principles for carrying out the audit of such corporate body.
3) The Auditor General shall, at all times, have power to examine any books of accounts for the purpose of carrying out the functions under sub article (1). It shall be the duty of the concerned chief of office to provide all such documents and information as may be demanded by the Auditor General or any of his or her employees.
4) The accounts to be audited pursuant to clause (1) shall be maintained in the form prescribed by the Auditor General, as provided for in the Federal law.
5) In addition to the accounts of the offices mentioned in sub article (1), the Federal law may also require the accounts of any other offices or bodies to be audited by the Auditor General. Further, as per section 11(1) of Audit Act 2075, the statutory auditor of the company shall be appointed by the company subject to principle prescribed by the Auditor General. However, such auditor shall be appointed after consulting the Auditor General [section 11 (2)].

   The procedures to be followed while consulting the Auditor General for appointing auditors and on matters of principles of audit to be followed by the auditors during their audit shall be as prescribed by the Auditor General. After the completion of audit, the corporate body shall deliver to the Office of the Auditor General a copy of the audit report submitted by the auditor appointed in consultation with the Auditor General [u/s 11(3)]. The Auditor General may issue directives to the concerned corporate body and auditor in respect of the irregularities observed in the report received and it shall be the duty of concerned organization to abide by such directives [u/s 11(4)].

Question No. 7:

How does the Auditor General of Nepal check the books of accounts from the propriety view? Explain.

[June, 2015](5 Marks)

Answer:

Auditor General of Nepal has provided powers to conduct the audit of Government Offices and government owned corporations. Also the Section 9 of Audit Act, 2075 has provided special power to check the books of accounts from the propriety view as follows:

1) The Auditor General shall audit following matters considering the propriety thereof:
    a) On the propriety of any expenditure and its authorization, if in the opinion of the Auditor General such expenditure is a reckless one or is an abuse of national property, whether movable or immovable, despite that the expenditure confirms to the authorization, and
    b) On the propriety of all authorizations issued in respect of any grant of national property whether movable or immovable, fixed or current, or underwriting of any revenue, or any contract, license or permits relating to mining, forest, water resources etc and any other act of abandoning movable or immovable, assets of the nation.
    c) The Auditor General may not include in the report minor items of discrepancy and other items deemed as insignificant in view of their property which were observed during the audit of income and expenditure.
2) The Auditor General may, if finds appropriate, audit whether or not any officer within its jurisdiction has borne financial accountability using the accepted principle.
3) The Auditor General may not include in the report minor items of discrepancy and other items deemed as insignificant in view of their property which were observed during the audit of income and expenditure.

Question No. 8:

Financial Comptroller General is interested to appoint statutory auditor of Nepal Information Technology Ltd. where Government of Nepal has invested 54% equity shares, but one of the officer from the Comptroller Office requested Comptroller General to hire one advisor to advise him on this issue. You as an advisor, suggest to the Comptroller General referring the related Act

[December, 2013](5 Marks)

Answer:

Nepal Information Technology Ltd comes under the definition of a corporate body as prescribed by Audit Act, 2075. As per section 2(f) of the Act, a corporate body means a corporate body whose more than fifty percent shares or assets are owned by Government of Nepal, Province Government or Local Bodies and the term also means an institution whose more than fifty percent shares or assets are owned by corporate body.

Hence, as per section 11(1) of Audit Act 2075, the statutory auditor of the company shall be appointed by the company subject to principle prescribed by the Auditor General. However, such auditor shall be appointed after consulting the Auditor General [section 11 (2)].
The procedures to be followed while consulting the Auditor General for appointing auditors and on matters of principles of audit to be followed by the auditors during their audit shall be as prescribed by the Auditor General. After the completion of audit, the corporate body shall deliver to the Office of the Auditor General a copy of the audit report submitted by the auditor appointed in consultation with the Auditor General [u/s 11(3)]. The Auditor General may issue directives to the concerned corporate body and auditor in respect of the irregularities observed in the report received and it shall be the duty of concerned organization to abide by such directives [u/s 11(4)].
Hence, in the given case, Comptroller General of Nepal has no authority to appoint the auditor in the above type of company.

Question No. 9:
Palpa Power Limited is a company established by twenty nine shareholders having fifty seven percent assets ownership of Government of Nepal. Chief Financial Officer (CFO) informed the Managing Director (MD) of Palpa Power Company Limited that there are certain procedure as per the Audit Act, 2048 to be followed while appointing the auditor and conducting the audit. However, the MD argued that auditor will be appointed by the AGM. Advise with reasons who is correct; CFO or MD?

[December, 2012](5 Marks)

Answer:
Palpa Power Limited comes under the definition of a corporate body as prescribed by Audit Act, 2075. As per section 2(f) of the Act, a corporate body means a corporate body whose more than fifty percent shares or assets are owned by Government of Nepal, Province Government or Local Bodies and the term also means an institution whose more than fifty percent shares or assets are owned by corporate body.
Hence, as per section 11(1) of Audit Act 2075, the statutory auditor of the company shall be appointed by the company subject to principle prescribed by the Auditor General. However, such auditor shall be appointed after consulting the Auditor General [section 11 (2)].
The procedures to be followed while consulting the Auditor General for appointing auditors and on matters of principles of audit to be followed by the auditors during their audit shall be as prescribed by the Auditor General. After the completion of audit, the corporate body shall deliver to the Office of the Auditor General a copy of the audit report submitted by the auditor appointed in consultation with the Auditor General [u/s 11(3)]. The Auditor General may issue directives to the concerned corporate body and auditor in respect of the irregularities observed in the report received and it shall be the duty of concerned organization to abide by such directives [u/s 11(4)].
Hence, CFO is correct as there are certain procedures to be followed as above.

Question No. 10:

Share structure of Simkot Solar Energy is as follows:

Humla People	15%
Other Nepalese	5%
Nepal Electricity Authority	80%

The management of Simkot Solar Energy has written a letter to ICAN for audit of the books of account of the company for 2067/68. ICAN, has handed over the letter to the office of the Auditor General of Nepal. Who has the authority to appoint auditors of Simkot Solar Energy? Justify your answer referring the provisions of Audit Act, 2048

[Final/June, 2012](5 Marks)

Answer:

Section 3 of the Audit Act, 2075 has described the power of Auditor General of Nepal to conduct the audit of corporate bodies wholly owned by the Government of Nepal, Province Government or Local Bodies. In a given case, Simkot Solar Energy is the subsidiary Company of Nepal Electricity Authority. The ownership of Nepal Electricity Authority is only 80%. It means, comes under the definition of a corporate body as prescribed by Audit Act, 2075. As per section 2(f) of the Act, a corporate body means a corporate body whose more than fifty percent shares or assets are owned by Government of Nepal, Province Government or Local Bodies and the term also means an institution whose more than fifty percent shares or assets are owned by corporate body. Hence, as per section 11(1) of Audit Act 2075, the statutory auditor of the company shall be appointed by the company subject to principle prescribed by the Auditor General. However, such auditor shall be appointed after consulting the Auditor General [section 11 (2)].

The procedures to be followed while consulting the Auditor General for appointing auditors and on matters of principles of audit to be followed by the auditors during their audit shall be as prescribed by the Auditor General. After the completion of audit, the corporate body shall deliver to the Office of the Auditor General a copy of the audit report submitted by the auditor appointed in consultation with the Auditor General [u/s 11(3)]. The Auditor General may issue directives to the concerned corporate body and auditor in respect of the irregularities observed in the report received and it shall be the duty of concerned organization to abide by such directives [u/s 11(4)].

Question No. 11:

What do you understand by "Corporate body wholly owned by government of Nepal"? Who is entitled to audit such corporate body which is wholly owned by Government of Nepal?

[June, 2012](5 Marks)

Answer:

As per section 2(b) of the Act, Corporate bodies wholly owned by Government of Nepal, Province Government or Local Bodies means a corporate body whose all shares of assets are owned by Government of Nepal, Province Government or Local Bodies or a corporate body whose all shares

or assets are owned by the aforesaid corporate body or by such corporate body and Government of Nepal Province Government or Local Bodies and this expression shall also include such corporate body for whom Government of Nepal Province Government or Local Bodies is required to bear full responsibility.

As per section 3(1) of Audit Act 2075, following entities shall be audited by the Auditor General:

a) Government Offices,
b) Corporate bodies wholly owned by Government of Nepal, Province Government or Local Bodies
c) Institutions or entities to be audited by the Auditor General as prescribed the federal laws

As per section 10(1) of the Act, if the Auditor General is constrained by time and resources to audit the corporate bodies wholly owned by Government of Nepal, Province Government or Local Bodies, as above, he/she may appoint license holder auditors under the prevailing laws an assistant. The auditor appointed as such shall act under the direction, supervision and control of the Auditor General [u/s 10(2)]. The powers, functions, duties and responsibilities of the auditors appointed as such and the procedures to be followed by them in course audit and provisions relating to their report shall be as prescribed by this Act and at its absence as prescribed by the Auditor General [u/s 10(3)]. The remuneration to be paid by the concerned organization to the auditors appointed pursuant to Sub-section (1) shall be fixed by the Auditor General keeping in view the volume of financial transactions, status of accounts, number of branches and sub-branches, work load and work progress of the concerned organization [u/s 10(4)].

Question No. 12:

Define the Power of the Auditor General of Nepal on:

i) Corporate Body fully owned by the Government of Nepal
ii) Subsidiaries of the (i) above substantially (more than 51%)

[Final/December, 2011](5 Marks)

Answer:

i. As per section 2(b) of the Act, Corporate bodies wholly owned by Government of Nepal, Province Government or Local Bodies means a corporate body whose all shares of assets are owned by Government of Nepal, Province Government or Local Bodies or a corporate body whose all shares or assets are owned by the aforesaid corporate body or by such corporate body and Government of Nepal Province Government or Local Bodies and this expression shall also include such corporate body for whom Government of Nepal Province Government or Local Bodies is required to bear full responsibility.

   As per section 3(1) of Audit Act 2075, following entities shall be audited by the Auditor General:

   a) Government Offices,
   b) Corporate bodies wholly owned by Government of Nepal, Province Government or Local Bodies

c) Institutions or entities to be audited by the Auditor General as prescribed the federal laws

As per section 10(1) of the Act, if the Auditor General is constrained by time and resources to audit the corporate bodies wholly owned by Government of Nepal, Province Government or Local Bodies, as above, he/she may appoint license holder auditors under the prevailing laws an assistant.

The auditor appointed as such shall act under the direction, supervision and control of the Auditor General [u/s 10(2)]. The powers, functions, duties and responsibilities of the auditors appointed as such and the procedures to be followed by them in course audit and provisions relating to their report shall be as prescribed by this Act and at its absence as prescribed by the Auditor General [u/s 10(3)]. The remuneration to be paid by the concerned organization to the auditors appointed pursuant to Sub-section (1) shall be fixed by the Auditor General keeping in view the volume of financial transactions, status of accounts, number of branches and sub-branches, work load and work progress of the concerned organization [u/s 10(4)].

ii. Nepal Information Technology Ltd comes under the definition of a corporate body as prescribed by Audit Act, 2075. As per section 2(f) of the Act, a corporate body means a corporate body whose more than fifty percent shares or assets are owned by Government of Nepal, Province Government or Local Bodies and the term also means an institution whose more than fifty percent shares or assets are owned by corporate body. Hence, as per section 11(1) of Audit Act 2075, the statutory auditor of the company shall be appointed by the company subject to principle prescribed by the Auditor General. However, such auditor shall be appointed after consulting the Auditor General [section 11 (2)].

The procedures to be followed while consulting the Auditor General for appointing auditors and on matters of principles of audit to be followed by the auditors during their audit shall be as prescribed by the Auditor General. After the completion of audit, the corporate body shall deliver to the Office of the Auditor General a copy of the audit report submitted by the auditor appointed in consultation with the Auditor General [u/s 11(3)]. The Auditor General may issue directives to the concerned corporate body and auditor in respect of the irregularities observed in the report received and it shall be the duty of concerned organization to abide by such directives [u/s 11(4)].

Question No. 13:

Write short note Matters of audit of propriety

[Final/June, 2011](5 Marks)

Answer:

The Auditor General shall audit the following matters in view of propriety thereof:

1) The Auditor General shall audit following matters considering the propriety thereof:
   a) On the propriety of any expenditure and its authorization, if in the opinion of the Auditor General such expenditure is a reckless one or is an abuse of national property, whether movable or immovable, despite that the expenditure confirms to the authorization, and

b) On the propriety of all authorizations issued in respect of any grant of national property whether movable or immovable, fixed or current, or underwriting of any revenue, or any contract, license or permits relating to mining, forest, water resources etc and any other act of abandoning movable or immovable, assets of the nation.

c) The Auditor General may not include in the report minor items of discrepancy and other items deemed as insignificant in view of their property which were observed during the audit of income and expenditure.

2) The Auditor General may, if finds appropriate, audit whether or not any officer within its jurisdiction has borne financial accountability using the accepted principle.

3) The Auditor General may not include in the report minor items of discrepancy and other items deemed as insignificant in view of their property which were observed during the audit of income and expenditure.

Question No. 14:

Audit Act, 1991

[Final/June, 2010](5 Marks)

Answer:

The objective of the Audit Act 1991 is to arrange audit of governmental or public bodies' accounts pursuant to section 3 of the Act as follows:

(1) The Auditor General may conduct final audit of the financial activities and other activities relating thereto of the offices, bodies or organizations under its jurisdiction, either in detail or sporadically or a random basis and present the facts obtained there from, make critical comments thereon and submit its reports.

(2) The Auditor General may. if it deems necessary in course of audit exercise the following powers :-

(a) To check at any time the status of the program and project being operated under the grants obtained by Government of Nepal and examine documents relating to accounts;

(b) To require contractors of government contracts to produce relevant documents or other evidence relating to the contract, which are supposed to be in his/her possession;

(c) To hire services of any expert on the task of audit and, if necessary, engage someone under contract with reasonable remuneration.

Matters to be audited: section 4 of the Act:

The Auditor General, with due regard to the regularity, economy, efficiency, effectiveness and propriety, shall audit following matters to ascertain whether:

(a) the amount appropriated in the concerned heads and subheads by the Appropriation Act for respective services and activities have been expended for the specified purposes of designated services or activities within the approved limit;

(b) the financial transactions comply with the existing laws and the evidence relating to items of income and expenditure are sufficient;

(c) the accounts have been maintained in the prescribed forms and such accounts fairly represent the position of the transactions;
(d) the inventory of government assets is accurate and up to date and the arrangement for protection and management of governmental property is adequate;
(e) the arrangements for internal audit and internal control of cash, kind and other governmental property against any loss, damage and abuse are adequate and if so, are they pursued;
(f) the accounts of revenue, all other incomes and deposits are correct and the rules relating to evaluation, realization and methods of book keeping are adequate and if so, are they followed;
(g) the accounts relating to public debts, security, deposit, debt relief fund and the amounts set aside for debt services and repayment of debts are accurate;
(h) The accounts of income and expenditure of industrial and business services, and their balance of cash and kind, and the arrangements and rules relating to their financial transactions are adequate and if so, are they observed;
(i) The organization, management and job allocation of the office are sufficient and proper and are that operating accordingly;
(j) Any function is being unnecessarily performed in duplication by any employee or agency or any essential function is being omitted;
(k) The available resources, means and assets are properly utilized and the maintenance and perspiration thereof against any loss or damage has been properly arranged;
(l) The progress has been achieved within scheduled time and the quality and quantity of the work is satisfactory;
(m) The objective and policy of the Office is explicit and the program is delineated conforming to the specified objective and policy;
(n) The program is being implemented within the limits of approved cost estimate and the proceeds received in comparison to the cost is reasonable;
(o) The arrangements for maintaining data relating to target, progress and cost are adequate and reliable;

Matters to be audited in View of Propriety: section 5 of the Act:

(1) The Auditor General shall audit following matters considering the propriety thereof-
(a) On the propriety of any expenditure and its authorization, if in the opinion of the Auditor General such expenditure is a reckless one or is an abuse of national property, whether movable or immovable, despite that the expenditure confirms to the authorization, and
(b) On the propriety of all authorizations issued in respect of any grant of national property whether movable or immovable, fixed or current, or underwriting of any revenue, or any contract, license or permits relating to mining, forest, water resources, etc. and any other act of abandoning movable or immovable, assets of the nation.

(2) The Auditor General may not include in the report minor items of discrepancy and other items deemed as insignificant in view of their property which were observed during the audit of income and expenditure.

Audit of Corporate Bodies Wholly Owned by Government of Nepal: section 6 of the Act:

(1) Notwithstanding anything contained in the existing laws, the audit of the corporate bodies wholly-owned by Government of Nepal shall be audited by the Auditor General pursuant to this Act.
(2) If the Auditor-General is constrained by time and resources to audit the corporate bodies wholly-owned by Government of Nepal pursuant to sub-section (1) above he/she may appoint license holder auditors under the prevailing laws as assistant. While appointing auditor as such, he/she shall give priority to the Nepali citizen.
(3) The auditor appointed pursuant to sub-section (2) above shall act under the direction, supervision and control of the Auditor General.
(4) The powers, functions, duties and responsibilities of the auditors appointed pursuant to Sub-section (2) above and the procedures to be followed by them in course of audit and provisions relating to their report shall be as prescribed by the Auditor General.
(5) The remuneration to be paid by the concerned organization to the auditors appointed pursuant to sub-section (2) above shall be fixed by the Auditor General keeping in view the volume of financial transactions, status of accounts, number of branches and sub-branches, work load and work progress of the concerned organization.

Audit of Corporate Bodies Substantially Owned by Government of Nepal: section 7 of the Act:

(1) The audit of the corporate bodies substantially owned by Government of Nepal shall be done in accordance with the prevailing laws relating to such body.
(2) Notwithstanding anything contained in sub-section (1) above, the Auditor General shall be consulted while appointing an auditor for auditing of the corporate bodies substantially owned by Government of Nepal.
(3) The procedures to be followed while consulting the Auditor General for appointing auditors pursuant to Sub-section (2) above and on matters to principles of audit to be followed by the auditors during their audit shall be as prescribed by the Auditor General.
(4) The concerned organization shall deliver at the Office of the Auditor General a copy of the report submitted by the auditor appointed in consultation with the Auditor General pursuant to sub-section (2) above.
(5) The Auditor General may issue directives to the concerned organization in respect of the irregularities observed in the report received pursuant to sub-section (4) above and it shall be the duty of concerned organization to abide by such directives.

Annual Report of the Auditor General: section 8 of the Act:

The Auditor General shall submit its annual audit report, including his/her comments and opinions thereon, to the President of Nepal on the final audit of Government Offices and other offices and organization prescribed by prevailing laws, which are subject to audit by the Auditor General.

Provided that the Auditor General may submit a report if he deems necessary at any time to take immediate action against any loss or damage already happened or impending upon to the national assets. The President shall forward the Report received pursuant to subsection (1) above to the legislative -parliament.

Recruitment of Officers and Employees and Condition of Services: section 9 of the Act:

(1) There shall be officers and employees as approved from time to time by Government of Nepal in order to assist the Auditor General in the performance of his/her duties. The number of such employees shall not be reduced without the approval of the Auditor General.
(2) A separate cadre of officers and employees in the Office of the Auditor General shall be constituted. The recruitment and other conditions of services of the officers and employees within the cadre shall be as prescribed in the Rules to be framed under this Act.

Powers to issue Directives by the Auditor General: Section 10 of the Act:

The Auditor General may, subject to the Interim Constitution of Nepal, 2007 and the prevailing laws, issue directives to the concerned Government Offices, and Corporate Bodies wholly or substantially owned by Government of Nepal, from time to time to make proper arrangements on matters of accounts and to maintain regularity therein. It shall be the duty of the concerned offices or organizations to abide by such directives.

Powers to Frame Rules: Section 11 of the Act:

Government of Nepal may in consultation with the Auditor General, frame Rules for the implementation of this Act.

Pursuant to section 12 of the Act, necessary legal action shall be taken in respect of the faults and irregularities observed during the audit of income and expenditure and other financial matters of Government of Nepal, according to the prevailing laws.

Question No. 15:

Sleepwell Corporation Ltd., a corporation wholly owned by the Government of Nepal has not audited its books of accounts for the last two financial years. The shareholders of the company feel that the Auditor General could not perform the audit due to his time constraint and hence decided to appoint A-Z & Co., Chartered Accountants as its auditor in its Annual General Meeting.

i) Is its appointment valid?
ii) Will your answer be the same if A-Z & Co. is appointed by the Auditor General as his assistant to complete the audit of that corporation?

[June, 2007](5 Marks)

Answer:

i. As per section 2(b) of the Act, Corporate bodies wholly owned by Government of Nepal, Province Government or Local Bodies means a corporate body whose all shares of assets are owned by Government of Nepal, Province Government or Local Bodies or a corporate body whose all shares or assets are owned by the aforesaid corporate body or by such corporate body and Government of Nepal Province Government or Local Bodies and this expression shall also include such corporate body for whom Government of Nepal Province Government or Local Bodies is required to bear full responsibility.

As per section 3(1) of Audit Act 2075, following entities shall be audited by the Auditor General:

a) Government Offices,
b) Corporate bodies wholly owned by Government of Nepal, Province Government or Local Bodies
c) Institutions or entities to be audited by the Auditor General as prescribed the federal laws

Hence, such appointment being against the Audit Act 2075 is not valid.

ii. As per section 10(1) of the Act, if the Auditor General is constrained by time and resources to audit the corporate bodies wholly owned by Government of Nepal, Province Government or Local Bodies, as above, he/she may appoint license holder auditors under the prevailing laws an assistant.

The auditor appointed as such shall act under the direction, supervision and control of the Auditor General [u/s 10(2)]. The powers, functions, duties and responsibilities of the auditors appointed as such and the procedures to be followed by them in course audit and provisions relating to their report shall be as prescribed by this Act and at its absence as prescribed by the Auditor General [u/s 10(3)]. The remuneration to be paid by the concerned organization to the auditors appointed pursuant to Sub-section (1) shall be fixed by the Auditor General keeping in view the volume of financial transactions, status of accounts, number of branches and sub-branches, work load and work progress of the concerned organization [u/s 10(4)].

Hence, in the given case, if A-Z & Co. is appointed by the Auditor General as his assistant to complete the audit of that corporation, it will be a valid appointment.

Question No. 16:

Pratigaman Limited is a Company in which HMG holds 65% shares. Who will appoint the statutory auditor of the Company and who will the auditor submit his report to?

[December, 2003](3 Marks)

Answer:

Pratigaman Limited is a company in which GoN has majority stake (65% shareholding). Hence, as per section 11(1) of Audit Act 2075, the statutory auditor of the company shall be appointed by the company subject to principle prescribed by the Auditor General. However, such auditor shall be appointed after consulting the Auditor General [section 11 (2)].

After the completion of audit, the corporate body shall deliver to the Office of the Auditor General a copy of the audit report submitted by the auditor appointed in consultation with the Auditor General [u/s 11(3)]. The Auditor General may issue directives to the concerned corporate body and auditor in respect of the irregularities observed in the report received and it shall be the duty of concerned organization to abide by such directives [u/s 11(4)].

Question No. 17:

The Auditor General finds serious mismanagement and defalcation of Govt. funds during the audit of a Govt. enterprise, conducted 2 months after the submission of his annual audit report. What steps should the Auditor General take?

[December, 2003](2 Marks)

Answer:

As per section 19(6) of Audit Act, 2075, where there is a huge loss of movable or immovable national properties or it appears that if no any action is taken immediately such loss may incur, Auditor General can audit such transaction at any time and submit his report to the President or Province Chief.

Hence, in the given case, the Auditor General can report such findings to the President or Province Chief.

CHAPTER-16

ARBITRATION ACT, 2055

Question No. 1:
Implementation of Foreign award under Arbitration Act, 2055. **(June 2022) (4 Marks)**

Answer:
Pursuant to the section 34 of Arbitration Act, 2055, award taken in foreign country shall be implemented as follows:

1. Application:
A party willing to implement an award made in foreign country in Nepal shall submit an application to the High Court. The following documents should be attached with the application.

a. The original or certified copy of the arbitrators 'award.
b. The original or certified copy of the agreement.
c. In case the arbitrators award is not in the Nepali Language, an official translation thereof in Nepali language.

2. Recognition and implementation of foreign arbitral award:
In case Nepal is a party to any treaty which provides for recognition and implementation of decisions taken by arbitrators in foreign countries, any decision taken by an arbitrator after the commencement of this act within the area of the foreign country which is a party to that treaty shall be recognized and implemented in Nepal in the following circumstances subject to the provisions of that treaty and the conditions mentioned at the time of entering into the treaty.

a. In case the arbitrator has been appointed and award made according to the laws and procedure mentioned in the agreement.
b. In case the parties had been notified about the arbitration proceedings in time.
c. In case the decision has been taken according to the conditions mentioned in the agreement or upon confining only to the subject matters referred to the arbitrator.
d. In case the decision has become final and binding on the parties according to the laws of the country where the decision has been taken.
e. In case the laws of the country of the petitioner or the laws of the country where arbitration proceedings have been conducted, do not contain provision under which arbitration award taken in Nepal cannot be implemented.
f. In case the application has been filed for the implementation of the award within 90 days from the date of award.

3. Forward to the District Court:
In case the High Court is satisfied that the conditions mentioned in Sub-section (2) have been fulfilled in the application filed pursuant to Sub-section (1) it shall forward the award to the District court for its implementations.

4. No award implemented:
Notwithstanding anything contained in this Section, no award made by an arbitrator in a foreign country shall be implemented in the following circumstances.

a. In case the awarded dispute cannot be settled through arbitration under the laws of Nepal.
b. In case the implementation of the award is detrimental to the public policy.

Question No. 2:
Mention the grounds which disqualify a person to become an arbitrator under Arbitration Act, 2055.

[June 2021] (3 Marks) [June 2018] (4 Marks)

Answer:
Section 10 of the Arbitration Act, 2055 mentions a few grounds for disqualification to become an arbitrator in Nepal which are as follows:

1) Person disqualified to become a party to the contract under the prevailing laws of Nepal cannot be an arbitrator.
2) Person punished by a court on criminal charges involving moral turpitude.
3) Person becomes insolvent or been declared bankrupt.
4) Person having any interest on the issues to be settled through arbitration.
5) Person not having any specific qualification to become an arbitrator mentioned in the agreement.

Question No. 3:
What is an arbitration award? Explain.

(Dec, 2020) (3 marks)

Answer:
Arbitration award is a decision given by the Arbitration Tribunal. Section 26 of the Arbitration Act, 2055 has made the provision regarding the final award of the Tribunal. If the arbitrators are three or more than three majority decision is the decision of arbitration tribunal.

In case of different opinion among the arbitrators, the opinion of the chief arbitrator is the decision of arbitration tribunal.

All the arbitrators need to make the signature in the award. In case of descending opinion the concerned arbitrator need to make the decision in his opinion.

Question No. 4:
State the essential elements of arbitration.

(Dec, 2019) (3 marks)

Answer:

Following are the essential elements of a valid arbitration agreement:

a. Written form: It may be made before or after arising disputes.
b. No need to mention name of the arbitrator: It may be fixed by mutual agreement.
c. Disputes: Any disputes that arises thereof may be referred. The existence of dispute is compulsory.
d. All the essential elements of a valid contract.
e. Binding force of award: An award given by the arbitrator carries binding force against the disputed parties.
f. Simple procedure: The procedure of arbitration is simple which avoids the lengthy procedures of the regular courts.

Question No. 5:
Under what circumstances a court can appoint Arbitrator(s)?

[December, 2018](4 Marks)

Answer:
Section 7 of the Arbitration Act, 2055 provides for the appointment of Arbitrators by the High Court as under:

1) Any party of the Arbitral dispute may submit an application to the High Court for the appointment of arbitrator(s) in the following circumstances:
   a) In case no arbitrator can be appointed upon following the procedure contained in the agreement.
   b) In case the agreement does not mention anything about the appointment of arbitrators.
2) The application to be filed pursuant to sub-section (1) above, must explicitly mention the full name, address, occupation and the field of specialization of at least three persons who can be appointed as arbitrators, and also be accompanied by a copy of the agreement.
3) Upon receiving of an application pursuant to sub-section (1) above, the High Court shall notify all the parties and shall appoint arbitrators from the persons proposed by them in the case of consensus in that connection, and in the case of fail to consensus, the persons deemed appropriate by the High Court, within 60 days from the date of receipt of the application. The decision taken by the court in that manner shall be final.

Pursuant to section 8 of this Act, the High Court may appoint Arbitrator(s) in vacant posts in special circumstances subject to section 7 of this Act within 15 days.

Question No. 6:
Where shall the arbitrator locate his/her office as per the provision of the act?

[December, 2017](4 Marks)

Answer:
Section 12 of the Arbitration Act, 2055 has authorized to location of the arbitrator at the following place:

- At the place as specified in the agreement, if any.
- If the agreement does not specify the location of the arbitrators office, at the place selected by the concerned parties.
- In case the concerned parties do not select such place within 15 days from the date of appointment of the arbitrator, or in case the concerned parties fail to reach an agreement in that connection, at the place specified by the arbitrator in the light of all the relevant circumstances
- The arbitrators may except when any other arrangement has been made by the concerned parties, designate through mutual consultations the location of their office at any other appropriate place which is convenient for them to record the statements of witnesses, obtain the opinion of experts, and inspect any document, object or place.

Question No. 7:
Mention the process of appointment of arbitrator under the Arbitration Act, 2055.

[June, 2017](3 Marks)

Answer:
Pursuant to section 5 of the Arbitration Act, 2055, there shall be ordinarily (one or not mentioned in this Act) three Arbitrators in one arbitrator tribunal.
Basically, arbitrators are appointed on the basis of agreement done by the parties. Section 6 of the Arbitration Act, 2055 has explained if the names of arbitrators are inserted in the agreement then they themselves shall be recognized as having been appointed as arbitrators. In case the agreement has made provision to appoint them, then they are appointed as per the provision of the act. Each party shall appoint one arbitrator and these two appointed arbitrators shall appoint the third arbitrator who shall work as the chief arbitrator.
Section 7 of the Act mentions that if the arbitrator could not be appointed on the basis of above provision or there is no provision of appointment of arbitration in the agreement, then parties have to request to the High Court for the appointment of arbitrators and the Court will appoint arbitrator within 60 days either from the proposed names by the party in case of consensus or if consensus is not reached then the Court shall appoint appropriate person(s). Pursuant to section 8 of this Act, appointment of Arbitrators in vacant posts in special circumstances may be made in the manner in

which the arbitrator had originally been appointed or in its failure by the High Court on the party (ies) request.

CHAPTER-17

BANKING OFFENCE AND PUNISHMENT ACT, 2064

[Note: All answers suggested hereby have been updated as per Banking Offence and Commencement Act, 2064 with First Amendment 2073]

Question No. 1:
State punishment thresholds on commission of avail or provide credit, facility or discounts beyond the authority obtained or limit sanctioned under of the Banking Offence and Punishment Act, 2064. **(December 2022) (3 Marks)**

Answer:
Section 15(2) has been provided while avail or provide credit, facility or discounts beyond the authority obtained or limit sanctioned. If anyone commits such offence specified under the section 7(d) he/she will be punished with the fine and imprisonment as stipulated on the basis of claimed amount and depending upon the degree of offence committed.

Claim Amount	**Imprisonment**	**Fine**	**Compensation (Recovering claim Amount)**
Up to 10 lakhs	up to 1 year	As per claim amount	As per claim amount
10- 50 lakhs	2-3 years	As per claim amount	As per claim amount
50 - 100 lakhs	3-4 years	As per claim amount	As per claim amount
100 - 1000 lakhs	4-6 years	As per claim amount	As per claim amount
1000 - 5000 lakhs	6-8 years	As per claim amount	As per claim amount
5000 - 1 Arab	8-10 years	As per claim amount	As per claim amount
Above 1 Arab	10-12 years	As per claim amount	As per claim amount

Question No. 2:
State the extraterritorial jurisdiction of the Banking offence and Punishment Act, 2064. **(December 2021) (3 Marks)**

Answer:

The preamble of the Banking Offence and Punishment Act, 2064 provides the objectives of this Act. Accordingly, this Act has been enacted to provide legal provisions on banking offences and punishments with a view to promoting trust towards banking and financial system thereby mitigating the consequences and the risks that the banking and financial system may suffer on account of the offences may be occurred in course of transactions of Banks and Financial Institutions.

As to the extraterritorial scope of this Act, section 1(2) of this Act provides that this Act shall come into force within Nepal and also to the persons and institutions whomsoever, residing abroad after committing banking offence in Nepal.

Question No. 3:

How the encumbrance is created over the assets of a foreign individual in regard to any foreign individual does not appearing in front of investigation and inquiry officer under the Banking Offences and Punishment Act, 2064.

(June, 2021) (4 marks)

Answer:

As per Section 24 of the Act, the encumbrances on property of foreign national shall be created encumbrance by an order of court that is not presented before the investigation officer.

If any foreign individual does not appear in front of the investigation and inquiry officer as per the notice even after providing notice by the investigation and inquiry officer or serving it pursuant to Section 22, the investigation and inquiry officer may issue an order not to take outside Nepal or to create encumbrance over the property, entitlement, interest or concern held by him/her within Nepal, if any, till the person doesn't appear in front of the investigation or inquiry officer and it shall be the duty of the all concerned to comply with such order.

Person not complying with the order issued pursuant to Sub-section (1) shall be punished with a fine up to Rupees one hundred thousand by the investigation and inquiry officer. The losses or harm caused to the Government of Nepal or public institution, if any, due to such noncompliance of the order, shall also be recovered from him/her.

Question No. 4:

List out the offences of providing loan in an unauthorized manner under the Banking Offence and Punishment Act, 2064.

(Dec, 2019) (4 marks)

Answer:

Section 7 has provided such offence on loan that is provided in an unauthorized manner as following:

(a) Avail or provide loans by submitting an incorrect, false, or non-existent financial statement or by creating artificial business.

(b) Avail or provide over loans by way of unnatural overvaluation of collateral security.

(c) Avail or provide loans by way of unnaturally hiking the project cost based on false details.

(d) Avail or provide credit, facility or discounts beyond the authority obtained or limit sanctioned.

(e) Avail credit or advance by the chief executive officer or any employee of a bank or financial institution in a manner except under the employee benefits scheme prescribed in the prevailing employee administration bye-laws or employee loans or advances bye-laws of the bank or financial institution.

(f) Avail credit by promoter, director, a shareholder deemed to have a financial interest or the family members of such persons from the bank or financial institution provided that there will no restriction on availing loan on the security of fixed deposit receipt, gold or government securities.

(g) Re-avail or re-provide loans from or by other Bank of Financial Institution without having due release of the collateral security once provided to a Bank or Financial Institution or in excess than the amount covered by the collateral security against the same collateral security. Provided that, this restriction shall not be applicable in case of release of loans to be provided under pari passu consortium.

(h) Avail loans through an entity having established in the name of a person who, in fact, does not have financial capability to run the business or, who is a person under undue influence or bringing in a dummy borrower or extend loans knowing the said facts.

(i) Extend credit more than the requirement compared to the customer's business transaction.

(j) Accept or provide any sort of undue benefit in return to granting credit facility.

(k) Give or receive payment of the full or partial amount of the loan by bringing in dummy borrower by promoter, director, chief executive officer or a person authorized to disburse the loan with the intention of also availing the loan facility himself.

(l) Disburse any loan by promoter, director, chief executive officer or a person authorized to disburse the loan.to an individual or an organization with whom there is a financial interest involved.

Question No. 5:

What are the punishments to a valuator who has provided false report to the bank under banking offence and punishment Act, 2064?

[December, 2016](4 Marks)[June, 2019](3 Marks)

Answer:

As per clause (b) of section 7 and section 13 of the Baking Offence and Punishment Act 2064, no any valuator, while carrying out the valuation of movable or immovable assets held by a bank or financial institutions as a collateral security of a loan or non-banking movable or immovable asset of a bank or financial institution, shall not cause any loss or harm to the bank or financial institution by deriving excess, low or false valuation of such assets while valuating for the purpose of

auctioning sell or for other purpose relating to bank. Otherwise, the valuator shall be punished with following charges pursuant to section 15 of the Act:

As per section 15(3), if any valuator commits afore stated offense, along with the recovery of loss suffered amount he/she shall be punished with a fine equivalent to the loss amount and an imprisonment up to a period of four years, depending upon the degree of the offense committed.

In case the suit amount cannot be established in accordance with this Section, he/she shall be punished with a fine up to Rupees one million and an imprisonment up to two years [u/s 1(4)].

In case any organization commits any offense specified under this Act and if the concerned office bearer or the employee committing such offense be identified, he/she shall be held liable, if the office bearer or the employee could not be identified, the person working in the capacity of the organization head at the time of the occurrence of the offense shall be held liable [u/s 15(5)].

The person or organization attempting to commit a banking offense or the person or organization indirectly involved in committing such offense or the person assisting in committing such offense or the employees or the Chief Executive Officer or Office bearer of such assisting organization shall be punished with a half of the punishment that the offender may be subjected to [u/s 15(6)].

Question No. 6:

What act is considered as offence in the matter of opening bank account as set forth in the Banking Offence and Punishments Act, 2064?

[December, 2018](3 Marks)

Answer:

The Banking offence and Punishments Act, 2064 has prohibited unauthorized opening of bank account.

Pursuant to section 3 of this Act, while opening an account with a bank or financial institution or demanding cash payment, no one shall undertake the following acts:

a) Open or knowingly allow to open an account by submitting false documents, or deposit, caused to deposit or withdraw an amount from such an account or assist to do such acts or withdraw an amount from such account through using electronic card or instruments.
b) Open or allow to open an account in the name of a fictitious or other person or organization, except otherwise permitted by the laws.
c) Draw a cheque to obtain or to knowingly make payment from an account where he/she has an apparent knowledge that the account does not have sufficient balance to cover the amount of the cheque drawn.

Question No. 7:

Mention the objectives of enactment of Banking Offence and Punishment Act, 2064.

[June, 2018](3 Marks)

Answer:

Objective for the enactment of Banking Offence and Punishment Act, 2064 (First Amendment 2073) has been mentioned in the preamble of that Act. According to the preamble, it is enacted to

provide legal provisions on banking offences and punishments with a view to promoting trust towards banking and financial system thereby mitigating the consequences and the risks that the banking and financial system may suffer on account of the offences may be occurred in course of transactions of bank and financial institution.

Question No. 8:

Explain in details the unauthorized withdrawals or payments under Banking Offence and Punishment Act, 2064.

[December, 2017](3 Marks)

Answer:

Section 5 of Banking Offense and Punishment Act, 2064 has provided that while withdrawing or making payment from an account maintained with a bank or financial institution, no one shall:

a) Withdraw money, in an unauthorized manner, from other person's account,
b) Withdraw money by stealing a cheque held by other person or by obtaining the same in any other manner,
c) Transfer fund in an unauthorized manner, from customer's account or make unauthorized payment therefrom,
d) Obtain or make cash payment by getting any sort of fake or other person's bills of exchange, cheque, draft or other similar instruments in an unauthorized manner.

Question No. 9:

State the main banking offences under the Banking Offence and Punishment Act, 2064?

[June, 2017](4 Marks)

Answer:

Under chapter 2 through sections 3 to 14 of the Banking Offence and Punishment Act, 2064 deals with following banking offences:

ii) It is prohibited to open the accounts and demand for payments by unauthorized manners (section 3)
iii) It is prohibited to receive cheques, cheque books, or bank statements in unauthorized manner (section 4)
iv) It is prohibited to withdraw the cash or make the payment in an unauthorized manner (section 5)
v) It is prohibited to withdraw cash or make the payment through the electronic means in unauthorized manner. (Section 6)
vi) It is prohibited to take or to provide loan by unauthorized manner. (Section 7)
vii) Should not misuse the credit (section 8)
viii) Should not misuse the banking resources, means and assets (Section 9)
ix) Not to acquire assets or open account by borrower who has over dues. (section 10)
x) Not to stop credit facility in the way to loss working project of borrower. (Section 11)

xi) Not to make loss by making alteration in the accounts or ledger or by committing forgery or fraud. (section 12)

xii) Not to derive excess, low or false valuation. (Section 13), and

xiii) Not to carry out and cause to carry out irregular economic or financial transactions. (section 14)

CHAPTER-18

FINANCIAL MEDIATOR ACT, 2055

[Note: All answers suggested hereby have been updated as per Financial Mediator Act, 2055 with First Amendment, 2059 and Some Nepal Acts Amending Act, 2075]

Question No. 1:

Mention the grounds to cancel license of an institution violating directives issued under the Act Relating to Institutions Acting as Financial Intermediary, 2055. **(December 2022) (4 Marks)**

Answer:

Section 19 of the Act states the Power to Cancel License:

i) In case any Society violates the directives issued under Section 18, the Bank may issue a warning to it to correct its mistakes, or impose a bank on any of its functions. In case any society violates such directives for three times, or takes any of the following actions, the Bank may suspend or cancel its license.
   - In case the Society stops working as a financial intermediary.
   - In case the Society misappropriates its funds, or does not use such funds for purposes for which they have been received.
   - In case the Society does not comply with the directives issued by the Bank to introduce reforms or make any special arrangement in respect to any of its functions and activities by prescribing a time limit for that purpose.
   - In case the Society fails to renew itself under the 1977 Registration of Association Act and Section 7 of this Act.

ii) The Bank may, if it so deems necessary before issuing an order of cancellation of license underSub-Section (1), have necessary nquiries or investigations conducted in that connection.

iii) Before cancelling a license under Sub-Section (1), the Bank shall provide the concerned Society with an opportunity to submit its explanations.

Question No. 2:

Risk bearing fund under Financial Intermediary Act, 2055. **(June 2022) (3 Marks)**

Answer:

Section 25 of the Financial Intermediary 2055 has explained the risk bearing fund that has to be maintained by the organization for the possible losses during the transactions. The provision says further:

1. The institution shall establish a separate risk bearing fund, in addition to the fund set forth in Section 24, for the purpose of bearing the possible loss and damage while disbursing the micro-credit, and the amount to be set as prescribed of the remaining total credit applied in the investment by the last day of each financial year shall be credited to this fund.
2. The institution may invest the amount deposited in the fund pursuant to Sub-section (1) in the securities of the Government of Nepal or the Bank or periodic deposits of a commercial bank or financial institution.

3. The amount deposited in the fund pursuant to Sub-section (1) shall be used only for the remission of the micro-credit. Where it is required to so remit the micro-credit, the institution shall obtain the approval of the Bank.

Question No. 3:

Discuss the power of Nepal Rastra Bank to give direction in case of violation of terms as provided under the Financial Intermediary Act, 2055. **(December 2021) (3 Marks)**

Answer:

Section 18(1) of the Financial Intermediary Act, 2055 has provided that in the course of inspection or inquiry made pursuant to Sub-section (1), an institution is found to have committed any of the following acts, the Nepal Rastra Bank may give direction to the institution to make reforms in any activity to be carried out by the institution or to make any specific provision, within the period as specified by the Bank:

(a) Having failed to do any act as required to be done pursuant to this Act,

(b) Having done any act that is contrary to the depositors/savers and borrowers,

(c) Having failed to properly maintain its books of accounts, accounts or documents,

(d) Having failed to abide by the terms specified and directions given by the Bank,

(e) Having misappropriated the funds of the institution or used the received amounts in any activity that is contrary to the objectives of this Act,

(f) Having failed to provide such details, data or documents as demanded pursuant to this Act.

Pursuant to section 18(2) of this Act, it shall be the duty of such financial institutions to follow the instruction given by Nepal Rastra Bank from time to time.

Question No. 4:

Define Micro Credit Fund/ how is the fund of a Financial Intermediary Institution created under the Act Relating to Institutions Acting as Financial Intermediary, 2055?

[June, 2021] (3 marks) [December, 2010](5 Marks) [December, 2008](5 Marks)

Answer:

Section 24 of Financial Intermediary Societies Act, 1999 has defined the Micro Credit Fund. According to the provision of section 24(1), a society shall have a separate Micro-Credit Fund, which shall comprise the following amounts:

i. Grants or loans received from the Government, bank or local or foreign organizations or associations.
ii. A prescribed amount from the fees collected from the members of the society.
iii. Service charges collected in consideration of the services provided by the society.

iv. Interest, fees, etc received from micro-credit transactions.
v. Amounts received from other sources
vi. Amounts received through collection of micro savings
vii. Amounts received from commercial banks or financial institutions.

All expenses made in the name of the institution shall be chargeable on the fund as referred to in Sub-section (1).

Provided that, the amount collected from the micro-saving and received for the micro-credit shall not be spent for other purpose.

Amount of the fund shall be deposited in an account opened with any commercial bank or financial institution, and such account shall be operated as prescribed.

If there is a situation that the institution cannot disburse the micro-credit for the time being, the institution may, with the approval of the Bank, make investment in periodic deposits for a maximum period of six months.

Question No. 5:

What are the objective of the "Act Relating to Institutions as Financial Intermediary, 2055" Also highlight the provisions of accounts and audit as prescribed.

(Dec, 2020) (4 marks)

Answer:

Preamble of the Act Relating to Institutions Acting as Financial Intermediary, 2055 highlights the following objectives as under;

This Act aims to provide for the institutions, which act as financial intermediaries, to collect micro-savings and provide microcredit for bringing about improvement in the economic condition of the persons who reside in various parts of the country and have low income by having them participate in the micro-business.

Provisions related to accounts and audit of Financial Intermediary institution have been provided under section 26 of this Act, as under:

(1) The institution shall maintain separate accounts of the activities relating to financial intermediation, and prepare a balance sheet for each financial year, and get the same audited by any recognized auditor appointed by the general meeting of the institution within six months after the expiration of the financial year.

(2) In appointing an auditor pursuant to Sub-section (1) above, the same person or firm shall not be appointed for more than three consecutive times.

(3) The remuneration of auditor shall be as specified by the general meeting of the institution.

(4) If Nepal Rastra Bank so wishes, it may at any time examine or cause to be examined the accounts of the institution.

Question No. 6:
Explain whether Financial Mediator should be a company registered under the Companies Act, 2063 or not.

[June, 2017](3 Marks)

Answer:
As per Section 4 of the Financial Mediators Act, 2055, any institution registered under Association Registration Act, 2034 may apply to the Nepal Rastra Bank for conducting the function of the financial mediators in the prescribed format with thereby mentioned documents.
Hence, Financial Mediator could only be an institution registered under the Association Registration Act, 2034, which is a non-profit motive organization and not allowed to distribute the profits to its members. It may act as Financial Mediator only after obtaining license from the Rastra Bank and its constitution must include such purpose to carry on the business of financial mediator. According to the classification of banking and financial institutions, Financial Mediators fall under class D as per Banks and Financial Institutions Act, 2073.
Hence, they need to comply with the provisions of the Companies Act, 2063.

Question No. 7:
Procedures of licensing to financial mediators.
[Final/December, 2011](5 Marks) [December, 2009](5 Marks) [December, 2016](3 Marks)

Answer:
The Procedure of Licensing to Financial Mediators:
Application for license:
Chapter 2 of the Financial Mediator Act, 2058 provides for the procedure of licensing to financial mediator(s). Section 3 of this Act lays down prohibition on carrying out act of financial intermediation without license.

Under Section 4 of the Financial Mediators Act, 2055 any institution registered under Association Registration Act, 2034 may apply to the Nepal Rastra Bank for conducting the function of the financial mediators in the prescribed format explicitly mentions the following points

i) Certificate of registration and constitution of the institution,
ii) Name, address and occupations of the office bearers of the institution,
iii) Total number of the members of the institution,
iv) Movable and immovable properties of the institution,
v) Geographical location where the society intends to work as financial mediator,
vi) Other matters as prescribed

Issuance of license:
Section 5 of the Act prescribes about the issuance of license as follows:

1) If an application is made pursuant to Section 4, the Bank shall make necessary examination of the application, and if in so examining, it considers necessary to seek additional information

or details, it may seek additional information or details form the institution making such an application.

2) If, in making examination pursuant to Sub-section (1), the Bank considers appropriate to issue the license, it shall issue the license to the applicant, in the prescribed format, carry out the act of financial intermediation, by collecting the prescribed fees.
3) In issuing license pursuant to Sub-section (2) or in giving information of rejection, such license or information has to be issued or given within a maximum period of Seventy Five days after the date of receipt of application or the date of receipt of additional information or details where such additional information or details have been sought pursuant to Sub-section (1).

Question No. 8:

Rai Gaon Society registered under Association Registraton Act, 2034 had obtained license to work as a financial intermediary in Shrawan 1, 2070. The license of the society expired on Ashad 31, 2072 but not renewed till the date. Advise the society the procedures of renewal referring the provision of Financial Intermediary Society Act, 2055.

[December, 2015](5 Marks)

Answer:

Section 7 of Financial Intermediary Societies Act, 2055 has explained the renewal procedures of a society as follows:

1) A society must have its license renewed by the Bank every two years in the prescribed manner.
2) Any License which is not renewed within the time limit mentioned in Sub – Section (1) shall be ipso facto cancelled.
3) Other arrangements concerning renewal of license shall be as prescribed
   As per rule 6 of Financial Mediator Rules, 2056, following requirements shall be fulfilled while applying for renewal of the license:
   (2) Application should be given to the bank for the renewal of the license shall be as prescribed.
   (3) Following documents should be submitted to the Bank while giving application for the renewal of the license as per sub rule (1):
      b) Yearly report as per section 32 of the act and other financial detail as per mention by bank.
      c) Certified photocopy of renewal of registration certificate of institution as per institution registration act, 2034.
      d) Details for any change made in management, objective, work jurisdiction etc of the institution.
      e) Voucher presented in the bank against the registration charge RS 100.
      f) Other necessary things as directed by the Bank.
   (4) While giving license if the Bank feels that the conditions and direction given from time to time are not complied with by the institution such license can be cancelled or renewal of the license may not be done.

(5) If any institution does not renew the license received by it within the mentioned time as per sub rule (1) bank can cancel such license.

Question No. 9:

Point out the basic functions, duties and powers of financial intermediary institutions as are conferred by the Act relating to institutions acting as Financial Intermediary Act, 2055.

[December, 2013](5 Marks)

Answer:

Functions, duties and powers of Financial Intermediary institutions have been provided under section 8 of the Act relating to Institutions Acting as Financial Intermediary, 1999 as under:

b) To encourage the persons with low income to form groups;

(a1)To collect micro-savings from groups or members of groups;

c) To disburse micro-credit with or without taking security or guarantee of any movable, immovable property to a group or the members of a group to carry on a micro-business;

d) To obtain loans or grants from the Government of Nepal or a bank or native or foreign organization, association etc. and to use such loans or grants in the disbursement of micro-credit or in the activities making such act effective;

Provided, however, that in obtaining loans, grants or other assistance from a foreign organization, association etc, the institution has to obtain approval of the Government of Nepal through the Bank;

e) Prior to disbursing the micro-credit, to evaluate the work for which the credit has been demanded, and identify whether such a work is feasible or not;

f) To make publicity about the micro-businesses which are of such nature as to bring about improvement in the economic condition of the persons with low income;

g) To hold symposia about the micro-business, give training to formulate projects, render assistance, provide technical knowledge and bring about technical assistance as per necessity;

h) To provide necessary services to the groups in relation to the mobilization of the micro-saving and micro-credit;

i) To take necessary action towards the recovery of micro-credit in time;

j) To make inquiry, from time to time, into whether the microcredit has been properly utilized or not, and if, in the course of making such inquiry, it appears that the micro-credit has not been utilized properly, to give necessary direction or take necessary action;

k) To perform such other functions as prescribed in relation to the collection of the micro-saving and disbursement of the micro-credit;

l) To act as an agent of a commercial bank or financial institution.

Question No. 10:

How is the fund of a financial intermediary institution created?

[Final/December, 2012](5 Marks)

Answer:

Pursuant to section 24 of the Financial Intermediary Institutions Act, 2055, the Financial Intermediary Institution (FII) shall have its own fund created with the following amounts:

a) Grants or loan received by the Government of Nepal, or NRB, or local or foreign institutions and organizations,
a1) Amounts collected from micro-financing,
a2) Amounts received from commercial banks or financial institutions,
b) Specified amount out of the fees collected from the members of the FII,
c) Service fees obtained from the services rendered by the FII,
d) Interest, fees or other amounts received by micro-financing,
e) Amounts received from other sources.

All expenditure of the FII shall be borne by this fund. But the amount of micro-savings collected and the amounts allocated for micro-credit shall not be expended for any other purposes. The amount of the fund shall be deposited in an account of a commercial bank or a financial institution, and such bank account shall be operated in a manner as specified. In case the FII cannot invest the amount of the fund immediately in micro-credit, it may by getting permissions of NRB invest the amount of fund in a term savings for a maximum period of six months.

Question No. 11:

Explain the term "Financial Intermediation". What are the conditions on which license of a financial intermediary society can be cancelled by Nepal Rastra Bank as per Financial Intermediary Societies Act, 1999?

[December, 2007](5 Marks)

Answer:

As defined in Section 2(a) of Financial Intermediary Societies Act, 1999 Financial Intermediation means the supply of micro-credit under the Act. Sec 2 (1) has further defined the term Micro-credit meaning a credit supplied for the operation of an income and employment-oriented enterprise subject to the limit prescribed by Nepal Rastra Bank from time to time. Therefore, Financial Intermediation means supply of credit for the operation of an income and employment -oriented enterprise with in the limit prescribed by the central bank.

As per Section 19 (1) of the Act, if any institution violates any direction given pursuant to Section 18, the Bank may warn it or restrict any act of the institution for reforms. If institution violates such direction for three times or does any of the following acts, the Bank may suspend or cancel the license of such an institution:

a) If the institution abandons the act of financial intermediation,
b) If the institution misappropriates the funds of the institution or does not use the amount in the purpose for which it has been obtained,
c) If the institution has failed to make reforms or make any specific provision in relation to any activity with specification of the period,

d) If the institution fails to obtain renewal pursuant to the Association Registration Act, .2034 (1977) and Section 7 of this Act.

As per section 19(2) of the Act, prior to issuing order to cancel the license pursuant to Sub-section (1), the Bank may, if it considers necessary, make necessary inquiry or examination in relation thereto.

As per section 19(3), prior to cancelling the license pursuant to Sub-section (1), the Bank shall give an opportunity to the concerned institution to submit explanation.

Question No. 12:

What is the objective of Financial Intermediary Societies Act, 1999? Does the Act have any relevance after the promulgation of the Banks and Financial Intuitions Ordinance, 2060?

[June, 2005](5 Marks)

Answer:

Financial Intermediary Societies Act, 1999 has been enacted with an objective to provide for the institutions, which act as financial intermediaries, to collect micro-savings and provide micro-credit for bringing about improvement in the economic condition of the persons who reside in various parts of the country and have low income by having them participate in the micro-business; As per the Financial Intermediary Societies Act 2055, Financial Intermediaries means the collection of small deposits and provisions of small loans under the Act. Such an organization should be registered under the Society Registration Act, and also should have received a license from the Nepal Rastra Bank for the function. Hence, the Act has relevance even after the promulgation of Banks and Financial Institution Ordinance, 2060.

Under Section 7 of the Act, in every 2 years the renewal of the license should have been duly performed with the Nepal Rastra Bank.

Question No. 13:

Jhur Bros, a financial intermediary applied to the Nepal Rastra Bank requesting permission to relinquish its functions. What steps should the NRB take?

[December, 2004](5 Marks)

Answer:

Nepal Rastra Bank may grant its permission to the financial intermediary society to relinquish its function as a financial intermediary, if the society is found to have met its liabilities in full pursuant to section 21 of Financial Mediator Act, 2055.

But if the bank finds that the Society has not been able to meet its liabilities in full, the bank should impose a ban on the society to carry out its functions as a financial intermediary and write to GoN to have its liabilities settled from its assets under the Association Registration Act, 2034.

NRB should therefore deal with the application of Jhur Bros accordingly after finding its liability position as stated above.

CHAPTER-19

FOREIGN EXCHANGE REGULATION ACT 2019

[Note: All answers suggested hereby have been updated as per Foreign Exchange Regulation Act, 2019 with Second Amendment, 2058 and Some Nepal Acts Amending Act, 2075]

Question No. 1:
Highlight the license procedures to carry on Foreign Exchange in accordance with the Foreign Exchange (Regulation) Act, 2019. **(December 2022) (3 Marks)**

Answer:
The License procedures, pursuant to the section 3, to be obtained to carry on foreign exchange transaction, are as follows:

i) A person, firm, company or body who intends to carry on the foreign exchange transaction shall obtain the license from the Bank.
ii) A person, firm, company or body who intends to carry on the foreign exchange transaction shall make an application, accompanied by the details specified by the Bank, to the Bank to obtain the license.
iii) If an application is made pursuant to Sub-section (1), the Bank shall make necessary inquiry into the matter on the basis of the specified criteria and may, if it considers appropriate, issue the license to the concerned person, firm, company or body to carry on the foreign exchange transaction. In so issuing the license, the Bank may also specify the type and limit of the foreign exchange to be transacted, the period for carrying on the transaction and other necessary terms.
iv) The Bank may, from time to time, give necessary order or directive to the licensee in relation to the regularization and management of the foreign exchange transaction. It shall be the duty of the licensee to abide by such an order or directive.
v) The licensee bank shall pay to the Bank such annual fees and deposits as may be prescribed by the Bank. The Bank may cancel or suspend the license of the licensee who fails to pay the annual fees and deposits so prescribed.
vi) If any person, firm, company or body applies for an provisional (Patake) license to carry on the foreign exchange transaction, the Bank may issue the provisional license to such a person, subject to this Section.

Question No. 2:
Explain the provision on reward to be provided to the informant under Foreign Exchange (Regulation) Act, 2019**.** **(December 2021) (4 Marks)** **[June 2018](3 Marks)**
Answer:
Section 20 of the foreign exchange regulation Act, 2019 has mentioned the provision on reward to the informant.
According to this provision if any person provides information to Government of Nepal or the authority authorized by the Government of Nepal that any person has done any act in contravention of this Act or Rules, Bye-laws, orders notices or directions or license framed or issued under this

Act and the foreign exchange is seized and the offence proved on the basis of the information so given, twenty percent of the amount in question set by converting such seized foreign exchange into the Nepalese currency shall be given as a reward to such informant. The amount of reward to be given shall be given from the amount to be set by converting such seized foreign exchange into the Nepalese currency after the finality of the case.

Question No. 3:

What are the actions to be imposed to the Money Changer who failed to abide by the order or directives issued by Nepal Rastra Bank.

[Dec, 2020/2019/2016](3 Marks)

Answer:

3A of Foreign Exchange (Regulations) Act, 2019 has explained the various actions to be taken to the money changer as follows:

(1) If a licensee fails to abide by the order or directive issued by the Bank pursuant to this Act, the Bank may take any or all of the following actions against such a licensee:

(a) To admonish,

(b) To impose restriction on any or all of the foreign exchange transaction,

(c) To forfeit the cash deposit in the Bank or make recovery from the guarantee,

(d) To suspend or cancel the license.

(2) In taking action against the licensee pursuant to Sub-section (1), the licensee shall be provided with a reasonable opportunity to defend himself or herself.

Question No. 4:

Describe the procedure for receipt of payments for exported goods as per Foreign Exchange Regulation Act, 2019.

[December, 2020/2015](5 Marks)

Answer:

Section 9A of Foreign Exchange (Regulations) Act, 2019 has explained the procedures to receive payment of value of exported goods as follows:

1) An exporter shall fill up the particulars mentioned in the declaration form prescribed by the bank and declare before the customs officer that he will be bring payment in a foreign exchange approved by the bank of the amount mentioned in such declaration form within the prescribed time limit.
2) In circumstances in which the amount to be received as payment for exported goods is higher or lower than the amount mentioned in the declaration form before receiving payment for the exported goods, he exporter shall submit an application to the bank along with evidence thereof, and in case the matter is provided, the bank may grant approval for receiving such higher or lower amount.

3) In case the exporter failed to obtain payments for the exported goods within the time limit prescribed under sub-section (1), he shall be deemed to have violated this act.
4) Notwithstanding anything contained in sub-section (3), in case the exporter submits an application to the bank clearly mentioning legitimate reasons for his failure to obtain payments for the exported goods within the time limit prescribed under sub-section (1), and in case the bank is satisfied with such reason, it may order the exporters after prescribing another time limit as in the following:
   a) If the foods have already been sold, to bring payments therefore;
   b) If the goods have not yet been sold, to sell them and bring the payments, or to bring the goods back to Nepal

   Provided that in case any exporter submits an application to the bank citing any appropriate reason for his failure to bringing payments for goods exported by him due to circumstances beyond his control, the bank shall conduct necessary investigations and permit him to bring the goods back or exempt him from bringing in payments either fully or partially.
5) In case the bank wishes to authenticate that the amount mentioned in the declaration form will be paid in the prescribed manner within the prescribed time limit, it may ask the exporter to submit the agreement concluded by the exporter with the foreign buyer in that connection, as well as other evidence.
6) For the purpose of ensuring the full receipt of payments for exported goods, the bank may issue orders in regard to al or any specific type of goods, or all or any specific exporter, making it obligatory to act as follows:
   a) Except as otherwise prescribed by the Government of Nepal, the payment for the exported goods has to be received through the means of letter of credit and other means as prescribed,
   b) In order to certify covenanting that the price as declared in the declaration form as referred to in Sub-section (1) is the real price for export, it is required to submit the said declaration form to the authority or institution as prescribed by the Bank.
7) Notwithstanding anything contained elsewhere in this section, provision concerning the export of know-how and information-oriented technologies and the procedure of receiving payments therefore shall be as prescribed by the bank through the publication and broadcast of public notification.

Question No. 5:

Give definitions of following terms under Foreign Exchange Regulation Act:

i) Dhitopatra (Securities)
ii) License – Holder
iii) Foreign Exchange Transactions

[June, 2010](5 Marks)[June, 2019](3 Marks)

Answer:

i. **Dhitopatra:**

Securities mean shares, stocks, bonds, debentures, debenture – stock or certificates or transferable deposit certificates relating to unit or mutual saving schemes issued by a corporate body under current law. The term includes Dhitopatra prescribed by the Government of Nepal by notification in the Nepal Rajpatra, or receipts relating to mortgage of Dhitopatra and rights and title pertaining to Dhitopatra.

ii. **License – holder:**

License – holder means an individual, firms, company or institution, which has obtained a license from Nepal Rastra Bank under Section 3 Foreign Exchange (Regulations) Act, 2062 to conduct foreign exchange.

iii. **Foreign Exchange Transactions:**

Foreign exchange transactions mean the business of buying and selling foreign exchange, acquiring or supplying loans in foreign exchange, or obtaining or supplying foreign exchange in any other way; the term includes the Bank's function of granting permission to deal in foreign exchange.

Question No. 6:

What are the procedures for obtaining a license to carry on foreign exchange transactions pursuant to the Foreign Exchange Regulation Act, 2019?

[December, 2018](3 Marks)

Answer:

The procedure for obtaining license to carry on foreign exchange transactions are provided in section 3 of Foreign Exchange Regulation Act, 2019 as under.

1) A person, firm, company or body who intends to carry on the foreign exchange transactions shall obtain the license from Nepal Rastra Bank (Bank).
2) A person, firm, company or body who intends to carry on the foreign exchange transactions shall make an application, accompanied by the details specified by the Bank, to the Bank to obtain the license.
3) If an application is made pursuant to sub-section (1) above, the Bank shall make necessary inquiry into the matter on the basis of the specified criteria and may, if it considers appropriate, issue the license to the concerned person, firm, company or body to carry on the foreign exchange transactions. In so issuing the license, the Bank may also specify the type and limit of the foreign exchange to be transacted, the period for carrying on the transaction and other necessary terms.
4) The Bank may, from time to time, give necessary order or directive to the licensee in relation to the regularization and management of the foreign exchange transaction. It shall be the duty of the licensee to abide by such an order or directive.

5) The licensee bank shall pay to the Bank such annual fees and deposits as may be prescribed by the Bank. The Bank may cancel or suspend the license of the licensee who fails to pay the annual fees and deposits so prescribed.
6) If any person, firm, company or body applies for a provisional *(Patake)* license to carry on the foreign exchange transaction, the Bank may issue the provisional license to such a person, subject to this Section.

Question No. 7:
Foreign Exchange.

[June, 2007](5 Marks)[June 2018](3 Marks)

Answer:
The Foreign Exchange Regulation Act, 1962 defines the term "Foreign Exchange" as under:
"Foreign Exchange" means foreign currency and the term includes deposits, credits and balances, foreign security and foreign shares of all types which are or can be paid in foreign currency, as well as drafts, traveler's cheques, letters of credit, and bills of exchange which are drawn in Nepalese currency but are or can be paid in foreign currency.

Question No. 8:
Bank and financial institutions can remit convertible foreign exchange directly for their certain payments under Foreign Exchange (Regulation) Act, 2019 without the approval from Nepal Rastra Bank. What are these payments?

[December, 2017](3 Marks)

Answer:
Bank and financial institutions can remit the following payments directly to the concerned parties without the permission from the Nepal Rastra Bank, however these activities must be related with the banks and financial institutions themselves:
1) Payment made for the procurement of books and newspapers for their own purpose.
2) Annual membership fee where the bank or financial institution is associated with the organization.
3) Payment of training or participation fee to the organization who organized these activities and where there is the participation from the bank or financial institutions.
4) Payment of international communication fee including SWIFT fee for their own purpose.
5) Payment of service charges to obtain Business Creditability Information internationally.

While making the payment bank and financial institution should kept all invoices and supports documents for their reference to ensure the payment is genuine.

Question No. 9:
Owner in relation to any securities.

[December, 2015](5 Marks)

Answer:
Section 2(L) of Foreign Exchange (Regulations) Act, 2019 has explained the meaning of the owner in relation to securities as follows:
Owner in relation to any securities includes

i. a person who has Right to sell, dispose or transmit the securities or
ii. a person who holds the securities in his or her name or
iii. a person who obtains dividends or interest of the securities on behalf of him or her or other person or
iv. a person who has any right in the securities, and where the securities are held in any trust or the dividends or interest thereof are deposited into any trust fund,
v. a person who has the right to operate or cancel or alter that trust and any terms thereof with or without consent of any other person or
vi. a person who has the right to control the investment of trust money.

Question No. 10:
Ms. Sarina Mahat had worked in different offices of World Bank in South American countries and has earned five million US Dollars. Ms. Sarina is now retiring next month and planning to come to Nepal. She need advise on the provisions relating to maintaining/keeping of foreign exchange obtained by her in the course of her employment.

[June, 2013](5 Marks)

Answer:
Foreign Exchange Regulating Act, 2019 provides guidelines on maintaining foreign exchange obtained by citizen of Nepal. Section 4A of the Act stated that the foreign exchange obtained by a citizen of Nepal shall be as specified by Nepal Rastra Bank (the "Bank") by publishing and broadcasting a public notice. If a citizen of Nepal who has earned foreign exchange or made investment from the foreign exchange during his or her stay in a foreign country intends to keep such a foreign exchange in or make invest from the foreign exchange in, a foreign country even after returning to Nepal, except on the conditions set forth in Section 6, such a citizen of Nepal may keep such a foreign exchange in or make investment thereof in the foreign country, by giving information thereof to the Bank**.** Section 6 of the Act states that in the event of foreign exchange crisis due to economic and monetary crisis in the country, the Government of Nepal may, by a Notification in the Nepal Gazette, order the citizens of Nepal who are owner of the foreign exchange to do as follows in relation to the foreign exchange owned by them:

ii. To produce, or cause to be produced, by the person who has the foreign exchange specified in the notice to the Bank in the name of the Government of Nepal, or to the person authorized by the Bank in that behalf, for sale at the rate determined by the Bank,

iii. To transmit the right by the person who has the right to transfer the title to the foreign exchange specified in the notice to another person in the name of the Government of Nepal by receiving the value to be set at the rate determined by the Bank. Provided, however, that, the Government of Nepal may, by the same notice or issuing another order, exempt any certain persons or persons of certain class from such an order.

Hence with the permission of NRB Mrs. Mahat can maintain the foreign exchange, however, provision of section 6 may be applied at any time.

Question No. 11:

What are the restrictions imposed by Foreign Exchange (Regulation) Act, 2019 against an exporter? Explain.

[Final/December, 2012](5 Marks)

Answer:

Section 9B of Foreign Exchange (Regulation) Act (FERA), 2019 imposes the following restrictions on the Exporter from doing:

a) To receive payment for the exported goods through other mode except as prescribed,
b) To arrange the payment for the exported goods delayed than the period as prescribed
c) To do any act in order not to receive payment for total value of the exported goods,
d) To do any act defying real invoicing or any other act pertaining to such an act.

Question No. 12:

Access Exchange Limited has obtained license to conduct foreign exchange transactions under the Foreign Exchange (Regulation) Act, 2019. During the inspection it was found that the company had not deposited all collected foreign currency in the prescribed bank account but sold illegally to the outside party.

What action can Nepal Rastra Bank take against Access Exchange Ltd. for the above activities?

[Final/December, 2011](5 Marks)

Answer:

Under Sub–Section (1) of Section 3A of the Foreign Exchange (Regulation) Act, 2019, if any license – holder fails to comply with any order or directive issued by NRB under this Act, NRB may take all or any of the following actions against that company:

(i) Warning
(ii) Ban all or any of the transactions in foreign exchange;
(iii) Suspension or cancellation of license.

While taking action against any license–holder under this Act, NRB must provide him/it with an appropriate opportunity to submit explanations in his/its defense.

Under Sub-Section (4) of Section 17, in case any offense punishable under this Act is committed by any firm, company or institution , the Director, office – bearer, employee or agent of the

concerned firm, company or institution responsible for the action connected with the offense at the time of its commission shall be liable to punishment.
Under Sub–Section (8), any person who fails to pay fines imposed under this section may be punished with imprisonment for a term not exceeding four years, depending on the amount of the fine.
Under Sub–Section (9), notwithstanding anything contained elsewhere in this Section, in case the amount involved in an offense connected with foreign exchange is Rs. 10 million or more, the concerned person shall also be punished with imprisonment for a term not exceeding three years, in addition to other punishment to be inflicted on him.
Under Sub–Section (10), action may be initiated against any person who has been arrested by the investing authority in the course of investigation, or who has been accused by the concerned court in connection with the case, by keeping him on bail in offenses involving not more than NRs. 1,00,000.00 , and by collecting a deposit according to the amount involved in the offense or by collecting a deposit fixed according to such amount requiring a deposit fixed according to such amount and requiring him to appear on fixed dates, in offenses involving more than NRs. 1,00,000.00.

Question No. 13:
Foreign exchange and foreign exchange transaction.

[December, 2011](5 Marks)

Answer:
Foreign exchange and foreign exchange transaction has been defined by the Foreign Exchange Regulation Act – 2019 as follows:
Section 2(d) “foreign exchange” means a foreign currency, deposits, credits and balances of all types which are paid or received in a foreign currency, foreign securities and cheques, drafts, travellers cheques, electronic fund transfers, credit cards, letters of credit, bills of exchange and promissory notes which are in international circulation and are or can be paid in a foreign currency, and this term also includes any other such monetary instruments as may be prescribed by the Bank by publishing and broadcasting a public notice;
Section 2(d1)"foreign exchange transaction" means the purchase, sale, lending and borrowing the foreign exchange or receiving or giving of the foreign exchange in any other manner, and this term also includes the act of giving permission by the Bank to convert the foreign exchange;

Question No. 14:
Foreign exchange and foreign exchange transaction.

[June, 2011](5 Marks)

Answer:

Foreign exchange and foreign exchange transaction has been defined by the Foreign Exchange Regulation Act – 2019 as follows:

Section 2(d) "foreign exchange" means a foreign currency, deposits, credits and balances of all types which are paid or received in a foreign currency, foreign securities and cheques, drafts, travellers cheques, electronic fund transfers, credit cards, letters of credit, bills of exchange and promissory notes which are in international circulation and are or can be paid in a foreign currency, and this term also includes any other such monetary instruments as may be prescribed by the Bank by publishing and broadcasting a public notice;

Section 2(d1)"foreign exchange transaction" means the purchase, sale, lending and borrowing the foreign exchange or receiving or giving of the foreign exchange in any other manner, and this term also includes the act of giving permission by the Bank to convert the foreign exchange;

Question No. 15:

Zit Limited has obtained licence to conduct Foreign Exchange Transactions under the Foreign Exchange (Regulation) Act, 1962. During the inspection it was found that the company had not deposited all collected foreign currency in the prescribed bank account despite sold illegally to the outside party.

What action can Nepal Rastra Bank take to Zit for the above activities?

[December 2009](5 Marks)

Answer:

Under Sub – Section (1) of Section 3A of the Foreign Exchange (Regulation) Act, 2062, if any licence – holder fails to comply with any order or directive issued by the Bank under this Act, the Bank may take all or any of the following actions against him/it:

i. Warning
ii. Ban all or any transaction in foreign exchange;
iii. Suspension or cancellation of license.

While taking action against any license – holder under this act, the bank must provide him/it with an appropriate opportunity to submit explanations in his/its defence.

Under Sub – Section (4) of Section 17, in case any offense punishable under this Act is committed by any firm, company or institution, the Director, office – bearer, employee or agent of the concerned firm, company or institution responsible for the action connected with the offense at the time of its commission shall be liable to punishment.

Under Sub – Section (8), any person who fails to pay fines imposed under this Section may be punished with imprisonment for a term not exceeding four years, depending on the amount of the fine.

Under Sub – Section (9), notwithstanding anything contained elsewhere in this Section, in case the amount involved in an offense connected with foreign exchange is Rs. 10 million or more, the

concerned person shall also be punished with imprisonment for a term not exceeding three years, in addition to other punishment to be inflicted on him.
Under Sub – section (10), action may be initiated against any person who has been arrested by the Investing authority in the course of investigations, or who has been accused by the concerned court in connection with as case, by keeping him on bail in offenses involving not more than Rs. 100,000, and by collecting a deposit according to the amount involved in the offense or by collecting a deposit fixed according to such amount and requiring a deposit fixed according to such amount and requiring him to appear on fixed dates, in offenses involving more than Rs. 100,000.

Question No. 16:
What facilities are provided to foreign investors for repatriation of foreign exchange under the Foreign Exchange Act, 1962?

[December, 2007](5 Marks)

Answer:
As per Section 10C of the Foreign Exchange Regulation Act 1963, the following provisions are available to the foreign investor investing in Securities for repatriation of foreign exchange:

1) Every investor who has obtained permission under current law to make investments in Securities may repatriate the following amounts in foreign exchange outside Nepal according to the procedure prescribed by the Nepal Rastra Bank.
   ii. Investments made in Securities and profits or dividends received in consideration thereof,
   iii. Investments made in the form of loans or credit facilities, and interest thereon
2) In case of any Nepali national residing outside Nepal is granted permission to make foreign exchange investment in Nepal, he shall be provided with the facility mentioned above as well.
3) Such repatriation in the foreign exchange may be made or sent on the basis of the amount to be set by the price or value of the securities at the stock exchange, in the case of the enlisted securities, out of the securities as referred to in Clause (a) of Sub-section (1), and on the basis of the property of the concerned body as determined in accordance with the procedures specified by the Bank by publishing and broadcasting a public notice, in the case of the securities not enlisted.
4) If payment of such tax or fee as required to be paid pursuant to the prevailing law is made in a foreign currency, any foreign person, firm, company or body may transfer the securities acquired by such a person, firm, company or body to any other foreign person, firm, company or body in accordance with the procedures set forth in the prevailing law.
5) Any foreign investor may repatriate or send abroad the amount of technological fees, royalty etc. as mentioned in the agreement for the transfer of technology made by that investor pursuant to the prevailing law.
6) The procedures for repatriating or sending the amount in lieu of the sale of air ticket and cargo made by any licensed foreign airlines ortheir agents operating in Nepal or any Nepalese person,

firm, company or body authorized to do that act within Nepal shall be as specified by the Bank by publishing and broadcasting a public notice.

7) Notwithstanding anything contained elsewhere in this Section, a person, firm, company or body who makes investment in the Nepalese currency but does not earn foreign currency shall be entitled to receive or give payment in a foreign currency in accordance with this Section.

Question No. 17:

Oriental Co. Ltd. exported the Nepalese handicrafts worth $ 20 million to Germany after duly filling the declaration form that such amount will be brought in Nepal within a period of three months

i. What will be the legal course of action if the Company receives only $ 18 million because the goods amounting to $ 2 million found defective and are returned to Nepal?
ii. Will your answer be the same if the Company does not receive money within the prescribed period of three months?

[June, 2007](5 Marks)

Answer:

i. Oriental Co. Ltd. has filled up the particulars in the declaration form as prescribed by Nepal Rastra Bank and declared that it will bring foreign exchange $ 20M within the period of three months. However, it could bring only $ 18M because of the fact that the remaining goods found defective and returned back to Nepal. In such as a case, Nepal Rastra Bank shall grant the approval of receiving such lower amount. This provision is mentioned in Section 9A (2) of the Foreign Exchange Regulation Act, 1962.

ii. Section 9A (3) & (4) of the same Act provides that if the exporter could not obtained payment for the exported goods within the prescribed time limit, it shall deemed to have violated this Act. However, if the exporter submits application to Nepal Rastra Bank mentioning the valid reasons for the failure to obtain payments with the prescribed time limit and if the Bank is satisfied it may order the exporter as follows after prescribing another time limit:
   a) If the goods have already been sold, to bring payments therefore;
   b) If the goods have not been sold, to sell them and bring the payments, or to bring the goods back to Nepal.

   In the above case, M/s Oriental Co. Ltd. failed to bring back the payments within the prescribed time limit and hence, it shall be deemed to have violated the Act unless it submits the valid reason for failure to obtain the payment within the time limit. If it could produce such reason, NRB may order it to bring payment, sell them and bring payment or bring back the goods in Nepal as the case may be within revised time limit.

Question No. 18:
Fine & Punishment in case of over invoicing import.

[June, 2006](5 Marks)

Answer:
According to section 17(5) of the Foreign Exchange Regulation Act, 1992, if any importer who makes imports in contravention of the procedures for imports set out in Section 8 of the Act, or who imports by over-invoicing shall be punished with a fine equal to the amount involved in the import and an additional fine not exceeding three times thereof.
Sub-section (4) of the said section provides that if an offense punishable under this Act is committed by any firm, company or institution, the director, office bearer, employee or agent of such entity responsible for the offense shall be liable for punishment.
Further sub-section (9) states that if the amount involved in the offense is Rs. 10 million or more, additional punishment by way of imprisonment for a period not exceeding three years will be imposed.

Question No. 19:
Comment legally in both the cases:

i. A, a Nepalese Citizen happened to pay US $ 100 to B, a resident of the USA.

ii. P, a Nepalese Citizen happened to receive a loan of US $ 1,000 from a foreigner staying in Kathmandu for many years

[December, 2005](5 Marks)

Answer:
Under Section 9 (ga) of the Foreign Exchange Regulation Act 2019 BS no person residing in Nepal is authorized to pay foreign exchanges to residents of foreign countries except under law.
Also, under section 10 (Kha) of the same act no Nepalese can receive loans in foreign exchange unless otherwise provided.
In this both the cases penalties can be levied under the Act.

Question No. 20:
What do you understand by foreign investment as per the FOREX Regulation Act, 1962?

[June, 2005](5 Marks)

Answer:
As per section 2 (g1) of the Foreign Exchange Regulation Act, 1962 foreign investment means the following categories of investments made by foreign investors in any firm company or institution:

- Investment in shares
- Investment in deposits
- Re-investment of income from investment under sub-clause (1) and (2)
- Investment made in the form of loans or credit facilities

Question No. 21:

AIC Ltd. imported fertilizers from Israel by remitting Rs.150 Millions equivalent foreign currency. Investigations revealed that the import was over invoiced by 20% with the collusion of the Managing Director and Finance Manager of the Company. What is the liability of the Company and its corrupt officials for this offense under the Foreign Exchange (regulation) Act, 1962?

[June, 2005](5 Marks)

Answer:

As per sub-section 5 of section 17, of Foreign Regulation Act, 1962 any importer who makes imports in contravention of the procedures for imports set out in section 8 of the act or who imports by over-invoicing, shall be punished with a fine equal to the amount involved in the import and an additional fine not exceeding three times thereof.

Sub-section 4 provides that if an offense punishable under this Act is committed by any firm, company or institution, the director, office bearer, employee or agent of such entity responsible for the offence shall be liable for punishment.

Sub-section 9 states that if the amount involved in the offense is Rs. 10 Million or more, additional punishment by way of imprisonment for a term not exceeding there years will be imposed.

Hence the Managing Director and Finance Director of AIC Ltd. will attract punishment under sub-section 5 (as per sub-section 4)and sub-section 9 of section 17 of the Foreign Exchange Regulation Act, 1962.

Question No. 22:

A case has been filed against Dr. Talkative, a citizen of Nepal, because he has invested all his earning amounting to US$ 10, 00,000.00 in the U.S. Stock market. His income was from his service in the U.S. in the years 2002-04. The charge against him is that he did not bring a single dollar from his earnings to Nepal. Advise Dr. Talkative on the defense he can raise

[December, 2004](5 Marks)

Answer:

Under the foreign exchange regulation Act, 2019 (Section 10 ka) any Nepalese national while in foreign lands can make investments in the foreign land and his earnings are there. So this legal provision protects Dr. Talkative from being penalized provided he can show that his investments were out of his earnings in the foreign land.

Question No.23:

ABC (P) Ltd., a garment exporter makes arrangements to receive the payments from the LX Company, a United Kingdom based firm for the garments exported after a month than that of the prescribed time limit. Will action of ABC (P) Ltd. Is justified?

[June, 2004](5 Marks)

Answer:

According to the section 9B of the Foreign Exchange Regulation Act, 1962, an exporter must not take any of the following actions:

a) To receive payment for goods exported in any manner other than the prescribed manner,
b) To make arrangements or obtaining payments for exported goods at a time later than the prescribed time limit,
c) To do anything for not receiving full payment for the exported goods.

Therefore, the action of the ABC (P) Ltd. is not justified.