Paper-13: CORPORATE LAWS AND COMPLIANCE

	Learning objectives	Verbs used	Definition
LEVEL C	KNOWLEDGE What you are expected to know	List	Make a list of
		State	Express, fully or clearly, the details/facts
		Define	Give the exact meaning of
	COMPREHENSION What you are expected to understand	Describe	Communicate the key features of
		Distinguish	Highlight the differences between
		Explain	Make clear or intelligible/ state the meaning or purpose of
		Identity	Recognize, establish or select after consideration
		Illustrate	Use an example to describe or explain something
	APPLICATION How you are expected to apply your knowledge	Apply	Put to practical use
		Calculate	Ascertain or reckon mathematically
		Demonstrate	Prove with certainty or exhibit by practical means
		Prepare	Make or get ready for use
		Reconcile	Make or prove consistent/ compatible
		Solve	Find an answer to
		Tabulate	Arrange in a table
	ANALYSIS How you are expected to analyse the detail of what you have learned	Analyse	Examine in detail the structure of
		Categorise	Place into a defined class or division
		Compare and contrast	Show the similarities and/or differences between
		Construct	Build up or compile
		Prioritise	Place in order of priority or sequence for action
		Produce	Create or bring into existence
	SYNTHESIS How you are expected to utilize the information gathered to reach an optimum conclusion by a process of reasoning	Discuss	Examine in detail by argument
		Interpret	Translate into intelligible or familiar terms
		Decide	To solve or conclude
	EVALUATION How you are expected to use your learning to evaluate, make decisions or recommendations	Advise	Counsel, inform or notify
		Evaluate	Appraise or asses the value of
		Recommend	Propose a course of action

Paper-13: CORPORATE LAWS AND COMPLIANCE

Full Marks: 100 **Time Allowed: 3 Hours**

This paper contains 3 questions. All questions are compulsory, subject to instructions provided against each question. All workings must form part of your answer. Assumptions, if any, must be clearly indicated.

Question 1: Answer all questions **[20 Marks]**

(i) Nitya Builders Ltd decides to pay 2.5 percent of value of debentures as underwriting commission to the underwriters but the articles of the company authorizes to pay only 2 percent underwriting commission on debentures. Comment on the validity based on Companies Act, 2013. [3]

(ii) The object clause of Memorandum of Association of the XYZ (Pvt.) Ltd., authorized to do trading in diamonds. The company, however, entered into partnership with Mr. Andy and traded in diamonds and incurred liabilities to Mr. Andy. The company subsequently, refused to admit the liability to Mr. Andy on the ground of 'ultra vires' the company. Advice whether stand of the company is legally valid and if so, gives reasons to support your answer. [3]

(iii) Mr. Bakshi resided for a period of 170 days in India during the financial year 2013-14 and thereafter went abroad. He came back to India on 1.04.2014., as an employee of a business organization. What would be his residential status during the financial year 2014-15 under FEMA, 1999? [3]

(iv) During the year 2015, Excel ltd. held four meetings of the Board on 2nd January 2015, 10th May, 2015, 16th October 2015 and 31st December 2015. Examine whether this was in accordance with the provisions of Companies Act, 2013. [3]

(v) Who is authorized to call a Board meeting? [3]

(vi) State the core elements that CSR should cover. [2]

(vii) State the responsibility of State Owned Enterprises in providing equitable treatment to shareholders. [3]

Answer

(i) As per the provisions contained in **Rule 13 of the Companies (Prospectus and Allotment of Securities) Rules, 2014**, a company cannot pay underwriting commission of 2.5% since the rate of underwriting commission cannot be more than 2.5% of issue price of debentures or such lower rate as prescribed under the articles, i.e. 2% in the present case

Hence, the maximum permissible underwriting commission in this case is 2%.

(ii) The company is not liable to Mr. Andy since the partnership agreement for trading in diamonds is an 'ultra vires' contract, and is not binding on the company or the other party. The power to enter into partnership is not an ancillary or incidental power. Such power can be legally exercised by the company only if the object clause of memorandum expressly authorizes the company to enter into partnership.

(iii) The residential status of an individual for a particular financial year is determined with reference to his residence in India in the immediately preceding financial year. In the problem given, Mr. Bakshi resided in India for less than 183 days in the financial year 2013-14. Therefore, for the financial year 2014-15 he is a 'Person resident in India' irrespective of the purpose or duration of his stay. Unless an individual resides in India for more than 182 days in the preceding financial year, he can in no case be termed as a person resident in India.

(iv) As per **Sec 173(1) of Companies Act, 2013** at least four Board meetings shall be held in each calendar year and not more than 120 days shall intervene between two consecutive meetings of the Board.

In the present case the gap between two consecutive Board meetings held on 2nd January 2015 and 10th May, 2015 was more than 120 days, and also the gap between two consecutive Board meetings held on 10th May and 16th October, was more than 120 days. Hence section 173 has been violated.

(v) The Companies Act, 2013 does not contain any provision as to who can convene a Board meeting. As per Regulation 67 of Table F, an individual director may requisition a Board meeting. On such requisition of a director, the manager or secretary shall be duty bound to summon a Board meeting. Any director (including the director requisitioning the Board meeting) may also summon the Board meeting. The notice of the Board meeting should be sent on behalf of the company.

(vi) The CSR Policy should normally cover following core elements:

1. Care for all Stakeholders
2. Ethical functioning
3. Respect for Workers' Rights and Welfare
4. Respect for Human Rights

5. Respect for Environment
6. Activities for Social and Inclusive Development

(vii) The SOEs should recognize the rights of all shareholders and in accordance with the OECD principles of corporate governance ensure their equitable treatment and equal access to corporate information.

- SOEs should observe a high degree of transparency towards all shareholders.
- The coordinating or ownership entity and SOEs should ensure that all shareholders are treated equally.
- The participation of minority shareholders in shareholder meetings should be facilitated in order to allow them to take part in fundamental corporate decisions, such as board election

Question 2: Answer any four questions **[60 Marks]**

Question 2(a)

(i) Explain the power of the central Government to exempt a class of banks or financial institutions, as per Sarfaesi Act, 2002.

(ii) Accounts and Balance Sheet along with auditor's reports has been filed with Reserve Bank of India after nine months from the end of the period to which these relate. Comment on the validity based on Banking Regulation Act, 1949.

(iii) Point out the circumstances where under the following powers may be exercised by the Securities and Exchange Board of India:

1. Prohibiting a company from issuing or publishing any document or advertisement soliciting money from public for, the issue of securities.

2. Pass cease and desist order in relation to any listed company.

What remedies are available to the companies against such orders under the Securities and Exchange Board of India Act, 1992.

(iv) Examine with reference to the relevant provisions of the Competition Act, 2002 whether Government department supplying water for irrigation to the agriculturists after levying charges for water supplied (and not a water tax) can be considered as an 'enterprise'.

[4+3+4+4 = 15]

Answer

(i) The Provisions of **section 31A of Sarfaesi Act, 2002** are explained as follows:

1. **Nature of exemption**

   The Central Government may, by notification in the public interest, direct that any of the provisions of this Act, -

   (a) Shall not apply to such class or classes of banks or financial institutions; or

   (b) Shall apply to the class or classes of banks or financial institutions with such exceptions, modifications and adaptations,

   as may be specified in the notification.

2. **Laying a copy of Notification before Parliament**

   A copy of every notification proposed to be issued shall be laid in draft before each House of Parliament, while it is in session, for a total period of 30 days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in disapproving the issue of the notification or both Houses agree in making any modification in the notification, the notification shall not be issued or, as the case may be, shall be issued only in such modified form as may agreed upon by both the Houses.

(ii) As per **section 31 of the Banking Regulation Act, 1949**, the accounts and balance sheet together with the auditor's report shall be furnished as returns to the Reserve Bank within 3 months from the end of the period to which they refer, viz. close of the financial year. However, the Reserve Bank may extend the said period of 3 months by a further period not exceeding 3 months.

In the given case, the required documents have not been filed with the Reserve Bank upto 9 months of close of the financial year. This amounts to contravention of section 31 of the Banking Regulation Act, 1949.

(iii) SEBI may take the following measures for the protection of investors:

1. It may specify by regulations -

   (a) the matters relating to issue of capital, transfer of securities and other matters incidental thereto; and

   (b) the manner in which such matters shall be disclosed by the companies;

2. It may, by a special or general order, -

   (a) prohibit any company from issuing of prospectus, any offer document, or advertisement soliciting money from the public for the issue of securities; and

   (b) Specify the conditions subject to which the prospectus, such offer document or advertisement, if not prohibited, may be issued.

3. It may specify the requirements for listing and transfer of securities and other matters incidental thereto."

(iv) The given problem relates to section **2(h) of the Competition Act, 2002**.

As per section 2(h), 'enterprise' means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

Thus, a Government department supplying water for irrigation to the agriculturists after levying charges for water supplied is an 'enterprise'.

Question 2(b)

(i) Indian citizens incorporated a company in U.K. for the purpose of carrying on business there. Examine with reference to the relevant provisions of the Companies Act, 2013 whether it is a "Foreign Company". What would be your answer in case the U.K. company was incorporated by a company registered in India?

(ii) What are the provisions relating to placing of annual report in the House(s) of State Legislature where the Central a Government is not a member in a Government company, as per Companies Act, 2013.

(iii) Mohan Company Limited decided to terminate the services of Mr. Dharmesh who was employed as Sales Manager. The Company, however, feels that the Sales Manager may not vacate the company's flat at Delhi. What action can be taken by the company under the Companies Act, 2013 to regain possession of the flat? Is it necessary to take such action before terminating the services of Mr. Dharmesh? Will it make any difference, if the flat is not owned by the company, but taken on lease?

[4+5+6 = 15]

Answer

(i) As per Section 2(42) of the Companies Act, 2013, 'foreign company' means any company or body corporate incorporated outside India which -

(a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and

(b) conducts any business activity in India in any other manner.

Thus, for deciding as to whether a company is a foreign company or not, the criterion is to see as to whether the company has established a place of business in India or not, and whether the company conducts any business activity in India in any other manner, and/not the persons who have incorporated the company.

In this case, Indian citizens have formed a company outside India. Since, the company has not established any place of business in India, and the company does not conduct any business activity in India in any other manner, the company cannot be said to be a foreign company. The fact that Indian citizens have formed a company in a foreign country is immaterial in deciding whether the company is a foreign company or not.

The answer would have remained same even if the U.K. Company had been incorporated by a company registered in India for the same reason as stated above.

(ii) The provisions relating to preparation and placing of annual report in the House(s) of the State Legislature are contained in section 395 of the Companies Act, 2013. These provisions are explained as follows:

1. Duties of the State Government

(a) Where the Central Government is not a member of a Government company, every State Government which is a member of that company, or where only one State Government is a member of the company, that State Government shall cause to be prepared an annual report on the working and affairs of that Government Company.

(b) The annual report shall be prepared within 3 months of the AGM of that Government company.

(c) The State Government(s) shall lay before the House or both Houses of the State Legislature –

(i) a copy of the annual report;

(ii) a copy of the audit report; and

(iii) comments upon or supplement to the audit report, made by CAG.

2. Applicability of Section 395

The provisions of section 395 shall, so far as may be, apply to a Government company in liquidation as they apply to any other Government company.

(iii) An officer or employee of a company shall be punishable with fine which may extend to ₹ 10,000 in the following cases:

(a) where he wrongfully obtains possession of any property of a company; or

(b) where he being in the possession of any property of the company, wrongfully withholds it or knowingly applies it to purposes other than those expressed or directed in the articles and authorised by this Act.

The Court may order him to deliver any such property within a time to be fixed by the Court.

The questions raised in the present case are answered as follows:

1. The Company can file a complaint under section 452 of the Companies Act, 2013 requesting the Court to make an order for delivering the possession of the property to the company.

2. The Supreme Court has held that section 452 of the Companies Act, 2013 applies both to 'existing officers or employees' and 'past officers or employees' (Baldev Krishna Sahiv Shipping Corporation of India Ltd. (1987) 3 Comp LJ 57]. Therefore, complaint under section 452 of the Companies Act, 2013 can be filed even if the services of Mr. Dharmesh have been terminated.

3. Section 452 of the Companies Act, 2013 does not concern the aspect of title, but it is exclusively confined to the aspect of possession. Accordingly, section 452 of the Companies Act, 2013 shall apply to a property, which does not belong to the company, but in respect of which the company is in exclusive possession. Accordingly, the company can make a complaint under section 452 of the Companies Act, 2013 even if the company is not the owner of the property but only has a leasehold right [Kannankadi Gopal Krishna Nair v Prakash Chunder Juneja (1994) 81 Comp Cas 104].

Question 2(c)

(i) Prithvi Limited is paying remuneration to its non-executive directors at the rate of one percent of the net profits of the company distributed equally among all the non-executive directors. Is it possible for the company to pay minimum remuneration to non-executive directors besides sitting fees in the event of loss in a financial year? Answer with reference to Companies Act, 2013.

(ii) The Board of directors of a public company in the private sector having made an average profit of ₹ 1 crore during the last 3 financial years propose to donate during the current year ₹ 40,000 to a general charitable fund.

Advise the Board of directors about their powers in respect of the above explaining the relevant provisions of the Companies Act, 2013.

(iii) Advise the Board of directors of a public company about their powers in respect of the following proposal explaining the relevant provisions of the Companies Act, 2013:

'Delegating to the managing director of the company the power to invest surplus funds of the company in the shares of some companies.'

(iv) Mr. Singh was appointed as the managing director of a public limited company for a period of 5 years effective from 1.04.2007. It is noticed that he performed certain acts on behalf of the company after the expiry of his term. Some of the aggrieved parties have questioned the validity of the managing director's acts. Advise, with reference to Companies Act, 2013.

[3+3+5+4 = 15]

Answer

(i) As per second proviso to **Sec 197(1) of Companies Act, 2013**, the remuneration of non-executive directors shall not exceed -

(a) 1% of net profits, if the company has employed a managing director or whole time director or manager; or

(b) 3% of net profits, if the company has not employed any managing director, whole time director and

Remuneration to a non-executive director may be paid only if the company has made profits [sec 197(3) of Companies Act, 2013]. Schedule V does not empower a company to pay remuneration to its non-executive directors where the company has suffered a loss.

There is no prohibition on payment of sitting fees even where the company has not earned any profits or its profits are inadequate.

(ii) As per section **181 of the Companies Act, 2013**, prior permission of the company in general meeting shall be required, if the amount of charitable contribution exceeds 5% of average net profits during preceding 3 financial years.

The donation of ₹40,000 to general charitable fund is not related to the business of the company and is therefore subject to the restrictions imposed under section 181 of the Companies Act, 2013. Accordingly, the donation shall not exceed 5% of average net profits during immediately preceding 3 financial years, unless prior permission of the company in general meeting is obtained. In the given case, donation upto ₹5,00,000 (being 5% of ₹ 1 crore) is permissible without obtaining prior permission of the company in general meeting.

Since, the Board has donated only ₹ 40,000, such donation is within the limits and does not require the prior permission of the company in general meeting.

(iii) As per **section 179(1) of the Companies Act, 2013**, the Board is entitled to exercise all such powers as the company is authorised to exercise. Similarly, the Board is authorised to do all such acts and things as the company is authorised to do. However, the provisions of section 179(1) of the Companies Act, 2013 are subject to the other provisions of the Companies Act, 2013 (e.g. Sections 179(3), 180, 181 and 182 of the Companies Act, 2013).

As per section 179(3) of the Companies Act, 2013, the powers relating to investment of funds of the company shall be exercised by the Board at a Board meeting only. However, such power may be delegated by the Board, subject to the following:

(a) The power to invest the funds of the company may be delegated to a committee of directors, managing director, manager, a principal officer of the company or a principal officer of the branch office.
(b) The delegation of power shall be made by passing a resolution at a Board meeting.
(c) The Board may delegate such power subject to such conditions as it may deem fit.

However, as per section 186 of the Companies Act, 2013, acquisition of securities of any body corporate shall be made by passing a unanimous resolution at a Board meeting only. Therefore, as per section 186, the power to invest the funds in the shares of other companies cannot be delegated.

In the present case, the power to invest surplus funds of the company in the shares of some companies is proposed to be delegated to the managing director of the company. Such delegation is not permissible in view of provisions of section 186 of the Companies Act, 2013.

(iv) **Section 176 of Companies Act, 2013** validates the acts of a director if it is subsequently discovered that -

– his appointment was invalid by reason of any defect or disqualification; or
– his appointment was terminated by virtue of any provision contained in the Act or in the articles.

However, the acts done by a director in his capacity as a managing director are not validated under section 176, except the acts done in the capacity of a director.

Where a managing director ceased to hold his office, all his subsequent acts were held to be invalid. It was not an irregular exercise of power, but exercise of power by a person who had no authority at all [Varkey Souriar v Keraleeya Banking Co. Ltd. AIR 1957 Ker 97].

The facts in the present case are identical to the facts referred to in the above case. Thus, the acts done by Mr. Singh, after the expiry of his term of office will not be valid.

Question 2(d)

(i) Seven Seas Company Ltd. in its annual general meeting appointed all its directors by passing one single resolution. No objection was made to the resolution. Examine the validity of appointment of directors explaining the relevant provisions of the Companies Act, 2013. Will it make any difference, if Seven Seas Company was a private company?

(ii) Annual general meeting of Adarsh Ltd. has been scheduled in compliance with the requirements of the Companies Act, 2013. In this connection, it has some directors who are rotational and out of which some have been appointed long back, some have been appointed on the same day,

Decide in this connection,

1. **Which of the directors shall be retiring by rotation and be eligible for re-election?**
2. **In case two directors were appointed on the same day, how would you decide their retirement by rotation?**
3. **In case the meeting could not decide how the vacancies caused by retirement to be dealt with, what shall be consequences?**
4. **What will be your answer, assuming that the matter could not be decided even at the adjourned meeting?**

(iii) Vriddhi Ltd, requires your advice in relation to applicability of appointment of woman director. Kindly advice with reference to Companies Act, 2013.

[4 + (2 ×4) + 3 =15]

Answer

(i) At a general meeting, two or more persons cannot be appointed as directors by a single resolution unless a resolution that appointment shall be so made has first been agreed to by the meeting without any 'vote being cast against it. A resolution moved in contravention of this provision shall be void, whether or not objection was raised at the time when such resolution was passed (**Section 162 of Companies Act, 2013**).

In the present case, all the members passed a single resolution appointing all the directors. The resolution is void since before moving the resolution for appointment of all the directors by a single resolution, no resolution was passed to the effect that all the directors shall be appointed by a single resolution. It is immaterial that no member objected to the appointment of all the directors by a single resolution.

As per section 176, the acts of these directors shall not be invalid till the defect in their appointment is noticed by the company.

Section 162 applies to all companies, whether public or private. Therefore, the answer would remain same even if the company in the present case is a private company.

(ii) The provisions relating to rotational directors, retirement of directors, reappointment of directors end automatic reappointment are contained in **section 152(6) and (7) of the Companies Act, 2013**. Applying these provisions, the given problem is answered as under:

1. Not less than 2/3rd of total number of directors (any fraction contained in that 2/3rd shall be rounded off as one) shall be rotational directors. Out of these rotational directors, l/3rd (or nearest to l/3rd) shall retire from office at every annual general meeting. A director retiring by rotation may be reappointed at the same annual general meeting. However, the company may, instead of reappointing the retiring director, appoint some other person.

2. The directors liable to retire by rotation shall be those who have been longest in the office. In case, two or more directors were appointed on the same day, the names of directors liable to retire shall be determined -
   (a) as per any agreement between them; or
   (b) by lots, in the absence of any such agreement.

3. If the vacancy in the place of retiring director is not filled up and the meeting has not resolved not to fill the vacancy, the annual general meeting shall adjourn to the next week at the same time and place or if that day is a public holiday, then to next succeeding day which is not a public holiday.

4. If at the adjourned meeting also, the vacancy in the place of retiring director is not filled up and the meeting has not resolved not to fill the vacancy, the retiring director shall be deemed to be reappointed. However, at an adjourned annual general meeting, a retiring director shall not be deemed to be automatically reappointed in the following cases:

   - Where a resolution for the reappointment of such director was put and lost.
   - Where the retiring director has, in writing, expressed his unwillingness to be reappointed.
   - Where he is not qualified or is disqualified for appointment.

- Where a resolution is required for his reappointment.
- Where a resolution in contravention of section 162 is passed.

(iii) The provisions relating to appointment of woman director are contained in **section 149 of the Companies Act, 2013 read with Rule 3 of the Companies (Appointment and Qualification of Directors) Rules, 2014.** These provisions are explained as follows:

Applicability

- Such class (es) of companies as may be prescribed, shall have at least 1 woman director.

- Following classes of companies have been prescribed for this purpose:
  (i) Every listed company; and
  (ii) Every public company having paid up share capital of ₹ 100 crore or more; and
  (iii) Every public company having turnover of ₹ 300 crore or more.

- For this purpose, the paid up share capital or turnover, as the case may be, as on the last date latest audited financial statements shall be taken into account.

Hence, if Vriddhi qualifies any of the above criterions it should appoint a woman director.

Question 2(e)

(i) The Board of directors of a company decides to revise the accounts which have already been adopted by the shareholders in annual general meeting. Advise.

(ii) Explain the concept of 'CSR' (Corporate Social Responsibility) as introduced by the Companies Act, 2013. Examining the provisions of the Act and state the applicability, constitution of CSR committee and its duties.

(iii) The Annual General Meeting of Supreme Limited declared a dividend at the rate of 30 percent payable on paid up equity share capital of the Company as recommended by Board of Directors on 30th April, 2013. But the Company was unable to post the dividend warrant to Mr. Rudra, an equity shareholder of the company, up to 30th June, 2013. Mr. Rudra filed a suit against the Company for the payment of dividend along with interest at the rate of 20 percent per annum for default period. Decide in the light of provisions of the Companies Act, 2013 whether Mr. Rudra would succeed? Also state the directors' liability in this regard under the Act.

[5+6+4 = 15]

Answer

(i) There is no provision in the Companies Act, expressly permitting or prohibiting revision or reopening of accounts after adoption. Generally, reopening or rectification of accounts is not permitted if the accounts have already been adopted at the annual general meeting. The Institute of Chartered Accountants of India is also of this opinion; accordingly, accounts once adopted by the members cannot be reopened, revised or rectified under any circumstances.

However, the Department of Company Affairs (now Ministry of Corporate Affairs) has permitted revision/rectification of accounts provided that -

- the revision is made for meeting the technical requirements of taxation laws or of any other law;
- such revision will result in true and fair view of state of affairs of the company;
- the revised annual accounts shall be adopted in the subsequent annual general meeting or extraordinary general meeting;
- the revised annual accounts shall be filed with the registrar as per section 137 of the Companies Act, 2013.

(ii) The provisions relating to corporate social responsibility are contained in section 135 of the Companies Act, 2013 read with the Companies (Corporate Social Responsibility Policy) Rules, 2014, as explained below:

1. Applicability

(a) Section 135 applies to a company (including a foreign company) only if it satisfies one or more of the following criterion during any financial year.

(i) The net worth of the company is ₹ 500 crore or more.
(ii) The turnover of the company is ₹ 1,000 crore or more.
(iii) The net profit of the company is ₹ 5 crore or more.

(b) Every company which ceases to fulfill the above criteria for 3 consecutive financial years shall not be required to -

(i) constitute CSR Committee; and
(ii) comply with the provisions contained in Section 135, till such time it meets the criteria specified above.

2. Constitution of CSR Committee

(a) Every company to which section 135 is applicable, shall constitute a Corporate

Social Responsibility Committee of the Board (CSR Committee).
(b) The CSR Committee shall consist of 3 or more directors.
(c) Out of the 3 directors, at least 1 director shall be an independent director.
(d) An unlisted public company or a private company which is not required to appoint an independent director (as per Section 149 of the Companies Act, 2013), shall have its CSR Committee without any independent director.
(e) A private company having only 2 directors on its Board, shall constitute its CSR Committee with 2 directors only.
(f) In case of a foreign company, the CSR Committee shall comprise of at 2 two persons of which one person shall be a person resident in India authorised to accept on behalf of the foreign company service of notices and other documents, and the other person shall be nominated by the foreign company.

3. Duties of the CSR Committee

(a) The CSR Committee shall formulate and recommend to the Board, a CSR Policy. CSR Policy shall indicate the activities to be undertaken by the company as specified in Schedule VII.
(b) CSR Committee shall recommend the amount of expenditure to be incurred on the CSR activities to be undertaken by the company.
(c) CSR Committee shall monitor the CSR Policy of the company from time to time.
(d) The CSR Committee shall institute a transparent monitoring mechanism for implementation of the CSR projects or programs or activities undertaken by the company.

(iii) As per section **127 of the Companies Act, 2013**, the dividend shall be paid within 30 days from the date of declaration of dividend. In case, the dividend warrant is posted by the company within 30 days of declaration of dividend, it is considered to be a sufficient compliance of section 127 of the Companies Act, 2013.

In the present case, the company has failed to post the dividend warrant within 30 days of declaration of dividend, and so, this amounts to contravention of section 127 of the Companies Act, 2013, attracting the penal provisions of section 127 of the Companies Act, 2013, Stated as under:

1. Mr. Rudra has the right to sue the company for recovery of dividend along with interest. However, the company shall be liable to pay simple interest @ 18% per annum, and not 20% per annum.

2. Every director who knowingly a party to the default, shall be liable for imprisonment upto 2 years and shall also be liable for fine of not less than ₹1,000 per day for each day of default.

Question 3: Answer any two questions **[20 Marks]**

Question 3(a)

(i) "Corporate Social Responsibility is to be considered as an investment and not as a charity" – Elaborate the statement.

(ii) What is Whole Life-Cycle Costing Risk Management? Why it is not widely embraced?

[5+5 = 10]

Answer

(i) The originally defined concept of CSR needs to be interpreted and dimensionalised in the broader conceptual framework of how the corporate embed their corporate values as a new strategic asset, to build a basis for trust and cooperation within the wider stakeholder community.

Though there have been evidences that record a paradigm shift from charity to a long-term strategy, yet the concept still is believed to be strongly linked to philanthropy. There is a need to bring about an attitudinal change in people about the concept.

By having more coherent and ethically driven discourses on CSR, it has to be understood that CSR is about how corporates place their business ethics and behaviors to balance business growth and commercial success with a positive change in the stakeholder community.

Several corporates today have specific departments to operationalise CSR. There are either foundations or trusts or a separate department within an organisation that looks into implementation of practices.

Being treated as a separate entity, there is always a flexibility and independence to carry out the tasks.

But often these entities work in isolation without creating a synergy with the other departments of the corporate. There is a need to understand that CSR is not only a pure management directive but it is something that is central to the company and has to be embedded in the core values and principles of the corporate.

Whatever corporates do within the purview of CSR has to be related to core business. It has to utilise things at which corporates are good; it has to be something that takes advantage of the core skills and competencies of the companies. It has to be a mandate of the entire organisation and its scope does not simply begin and end with one department in the organisation.

Charity means the act of donating money, goods, time or effort to support a charitable cause in regard to a defined objective. Charity can be equated with benevolence and charity for the poor and needy. It can be any selfless giving towards any kind of social need that is not served, underserved, or perceived as unserved or underserved. Charity can be by any individual or by a corporate.

Corporate Social Responsibility is about how a company aligns their values to social causes by including and collaborating with their investors, suppliers, employees, regulators and the society as a whole. The investment in CSR may be on people centric issues and/or planet issues. A CSR initiative of a corporate is not a selfless act of giving; companies derive long-term benefits from the CSR initiatives and it is this enlightened self interest which is driving the CSR initiatives in companies.

(ii) Whole life-cycle costing (WLCC) is rapidly becoming the standard method for the long-term cost appraisal of buildings and civil infrastructure projects. With clients now demanding buildings that demonstrate value for money over the long term, WLCC has become an essential tool for those involved in the design, construction, operation and risk analysis of construction projects.

WLCC risk management is one of the important issues facing building assets executives today. As spending on building assets rises, asset owners become increasingly worried about WLCC optimisation throughout the life span of facilities; consequently, they become highly vulnerable to the risk of operational costs. Usually, when decision makers are faced with an investment choice under uncertain conditions, their main concern is to avoid projects whose actual economic outcome might be less favourable than what is acceptable, resulting in the risk of missing out on potential investment opportunities.

Thus, the objective of WLCC risk management should be to assist decision makers in evaluating whole life alternatives so that investment success is maximised. Usually traditional methods are used to optimise this process. However, traditional approaches to risk management have failed miserably because of their demand for mysterious statistical data that the end user does not have (Koller 1999). The key to successful WLCC risk-process and risk modelling is to build a WLCC framework that requires from the user nothing more than they presently can provide. This can be a challenge that can be addressed through the use of a variety of techniques. That is why it is important to use a combination of risk management techniques (depending on the stage of assessment) for risk assessment in WLCC, ranging from simple deterministic approaches to uncertainty assessment (e.g. sensitivity and break even analysis methods which are easy to use and understand and require no additional methods of computation beyond the ones used in LCC analysis), to very sophisticated methods based on probabilities, artificial intelligence (AI) and a hybrid of both techniques.

The reasons why it fails to embrace WLCC are:

- The lack of universal methods and standard formats for calculating whole life costs.
- The difficulty in integration of operating and maintenance strategies at the design phase.
- The scale of the data collection exercise, data inconsistency.
- The requirement for an independently maintained database on performance and cost of building components.

Question 3(b)

(i) What is Corporate Governance? What is the need for Corporate Governance in India?

(ii) Write a note on CSR Policy, expenditure and reporting as per Companies Act, 2013.

[5+5 = 10]

Answer

(i) Corporate governance is:

- The system by which companies are directed and controlled - **The Cadbury Report, 1992.**

- The process of supervision and control intended to ensure that the company's management acts in accordance with the interests of shareholders - **Parkinson, 1994.**

- Corporate Governance is the acceptance by management of the inalienable rights of shareholders as the true owners of the corporation and of their own role as trustees on behalf of the shareholders. It is about commitment to values, about ethical business conduct and about making a distinction between personal and corporate funds in the management of a company – **Report of N.R.Narayana Murthy Committee on Corporate Governance constituted by SEBI (2003).**

Need for Corporate Governance:

Corporate Governance is integral to the existence of the company. It is needed to create a corporate culture of transparency, accountability and disclosure.

- **Corporate Performance:** Improved governance structures and processes help ensure quality decision-making, encourage effective succession planning for senior management and enhance the long-term prosperity of companies, independent of the type of company and its sources of finance.

- **Enhanced Investor Trust:** Investors consider Corporate Governance as important as financial performance when evaluating companies for investment.

- **Combating Corruption:** Companies that are transparent, and have sound system that provide full disclosure of accounting and auditing procedures, allow transparency in all business transactions, provide environment where corruption will certainly fade out.

- **Better Access to Global Market:** Good Corporate Governance systems attracts investment from global investors, which subsequently leads to greater efficiencies in the financial sector.

- **Enhancing Enterprise Valuation:** Improved management accountability and operational transparency fulfill investors' expectations and confidence on management and corporations, and return, increase the value of corporations.

- **Accountability:** Investor relations' is essential part of good Corporate Governance. Investors have directly/indirectly entrusted management of the company for creating enhanced value for their investment.

- **Easy Finance from Institutions:** Evidence indicates that well-governed companies receive higher market valuations.

- **Reduced Risk of Corporate Crisis and Scandals:** Effective Corporate Governance ensures efficient risk mitigation system in place.

(ii)

CSR Policy-

(1) The CSR Policy of the company shall, inter-alia, include the following, namely :-

(a) a list of CSR projects or programs which a company plans to undertake falling within the purview of the Schedule VII of the Act, specifying modalities of execution of such project or programs and implementation schedules for the same; and

(b) monitoring process of such projects or programs:

Provided that the CSR activities does not include the activities undertaken in pursuance of normal course of business of a company.

Provided further that the Board of Directors shall ensure that activities included by a company in its Corporate Social Responsibility Policy are related to the activities included in Schedule VII of the Act.

(2) The CSR Policy of the company shall specify that the surplus arising out of the CSR projects or programs or activities shall not form part of the business profit of a company.

CSR Expenditure-

CSR expenditure shall include all expenditure including contribution to corpus, for projects or programs relating to CSR activities approved by the Board on the recommendation of its CSR Committee, but does not include any expenditure on an item not in conformity or not in line with activities which fall within the purview of Schedule VII of the Act.

CSR Reporting-

(1) The Board's Report of a company covered under these rules pertaining to a financial year commencing on or after the 1st day of April, 2014 shall include an annual report on CSR containing particulars specified in Annexure.

(2) In case of a foreign company, the balance sheet filed under sub-clause (b) of sub-section (1) of section 381 shall contain an Annexure regarding report on CSR.

Question 3(c)

(i) Write short notes on:

1. **Corporate Governance in USA**
2. **Corporate Governance in Japan**

(ii) "The concept of Memorandum of Understanding (MoU) has been designed to provide flexibility and autonomy to CPSEs such that it facilitates them in pursuing the objectives and purposes, for which the enterprises have been set up."
In the light of the above statement, explain the concept of MoU in India.

[(2.5 × 2) + 5 =10]

Answer

(i)

1. **Corporate Governance in USA**

Corporate governance in the U.S. has changed dramatically since 1980. As a number of business and finance scholars have pointed out, the corporate governance structures in place before the 1980s gave the managers of large public U.S. corporations little reason to make shareholder interests their primary focus. Before 1980, corporate managements tended to think of themselves as representing not the shareholders, but rather "the corporation." In this view, the goal of the firm was not to maximize shareholder wealth, but to ensure the growth (or at least the stability) of the enterprise by "balancing" the claims of all important corporate "stakeholders"-- employees, suppliers, and local communities, as well as shareholders.

The external governance mechanisms available to dissatisfied shareholders were seldom used. Raiders and hostile takeovers were relatively uncommon. Proxy fights were rare and didn't have much chance of succeeding. And corporate boards tended to be cozy with and dominated by management, making board oversight weak.

Corporate Governance developments in USA:

- 1977 – The Foreign Corrupt Practices Act
- 1979 – US Securities Exchange Commission
- 1985 – Treadway Commission
- 1992 – COSO issued Internal Control – Integrated Framework
- 2002 – Sarbanes – Oxley Act
- The Dodd-Frank Wall Street Reform and Consumer Protection Act, 2010
- Updates to its U.S. Corporate Governance Policy (the "2013 Updates")

2. Corporate Governance in Japan

Japan's economy developed very rapidly during the second half of the twentieth century. Particularly during the period 1985-89, there was a 'bubble economy', characterized by a sharp increase in share prices and the value of land; the early 1990s saw the bubble burst as share prices fell and land was devalued, as well as shareholders and landowners finding themselves losing vast fortunes, banks found that they had severe problems too. The Japanese government wished to restore confidence in the Japanese economy and in the stock market, and to attract foreign direct investment to help regenerate growth in companies. Improved corporate governance was seen as a very necessary step in this process.

Japan's Corporate Governance System is often likened to that of Germany because banks can play an influential role in companies in both countries. However, there are fundamental differences between the systems, driven partly by culture and partly by the Japanese shareholding structure with the influence of the keiretsu (broadly, associations of companies). Charkham (1994) sums up three main concepts that affect Japanese attitudes towards Corporate Governance: obligation, family, and consensus.

The Japan Corporate Governance Committee published its revised Corporate Governance Code in 2001. The code had six chapters, which contained a total of 14 principles.

Summary of key characteristics influencing Japanese Corporate Governance

Feature	Key characteristic
Main business form	Public limited company
Predominant ownership structure	Keiretsu; but institutional investor ownership is increasing
Legal system	Civil Law
Board structure	Dual
Important aspect	Influence of keiretsu

In 2004, the Tokyo Stock Exchange issued the Principles of Corporate Governance for Listed Companies. Charkham (2005) discusses the various changes that have taken place in the context of Corporate Governance in Japan and states:

The important part the banks played has greatly diminished. In its place there are now better structured boards, more effective company auditors, and occasionally more active shareholders, an increase of interest, and, where appropriate, action on their part, might restore the balance that the banks' withdrawal from the scene has impaired.

In 2008, the Asian Corporate Governance Association (ACGA) published its 'White Paper on Corporate Governance in Japan'. It states, while a number of leading companies in Japan have made strides in corporate governance in recent years, we submit that the system of governance in most listed companies is not meeting the needs of stakeholders or the nation at large in three ways:

- By not providing for adequate supervision of corporate strategy;
- By protecting management from the discipline of the market, thus rendering the development of a healthy and efficient market in corporate control all but impossible;
- By failing to provide the returns that are vitally necessary to protect Japan's social safety net-its pension system.

It then advocates six areas for improvement: shareholders acting as owners; utilizing capital efficiently; independent supervision of management; pre-emption rights; poison pills and takeover defences; shareholder meetings and voting.

(ii) The Memorandum of Understanding (MoU) System in India was introduced in the year 1986, after the recommendations of the Arjun Sengupta Committee Report (1984). Twenty six years after its inception, the MoU system has evolved and is being strengthened, through regular reviews, to become a management tool that helps in performance evaluation as well as performance enhancement of CPSEs in the country.

The concept of Memorandum of Understanding (MoU) has been designed to provide flexibility and autonomy to Central Public Sector Enterprises (CPSEs) such that it facilitates them in pursuing the objectives and purposes, for which the enterprises have been set up. Accountability has to be understood in a wider sense by associating it with answerability for the performance of the tasks and the achievement of targets negotiated mutually between the Government and the CPSE. The rationale for MoU could be derived from principal/agent theory. The principal (administrative ministry on behalf of real owners - the people) can only observe outcomes and cannot measure accurately the efforts expended by the agent (CPSE managers). Also the Principal can only, to a limited extent, distinguish the effects of influences from other factors, which affect the performance. Therefore extensive intervention by administrators, who might not be too knowledgeable about the nature of problems confronting the enterprises, not only impacts productivity and profitability but also makes it impossible to fix accountability for non-achievement of targets.

A negotiated incentive contract (MoU), hence, is viewed as a device to reveal information and motivate managers to exert effort. Notwithstanding the spectacular performance of CPSEs in several areas, there has been a sense of disillusionment with some aspects of CPSE performance such as low profitability and lack of competitiveness. The extensive regulation of CPSEs by government had stifled the initiative and growth of public sector. The Economic Administration Reforms Commission (Chairman: L. K. Jha) had dwelt on issue of autonomy and accountability. The Commission had recommended a careful re-consideration of extant concepts and instrumentalities relating to the accountability of public enterprises with a view to ensuring (a) that they do not erode the autonomy of public enterprises and thus hampers the very objectives and purposes for which these enterprises have been set up and given corporate shape and for which they are to be accountable; and (b) accountability has to be secured in the wider sense of answerability for the performance of tasks and achievements of results. The adoption of MoU system in India could be seen as an attempt to operationalize this very vital recommendation.

In the backdrop of the dynamic external environment, "world- wide competition" and globalization, it is critical that the MoU system is strengthened such that it facilitates the CPSEs in becoming economically viable through efficient management and control. Hence, the MoU system aims at offering autonomy to CPSEs and is designed such that it can aid in the assessment of the extent to which mutually agreed objectives (Mandal, 2012) are achieved. This section of the report traces the evolution of the MoU system through various committee reports and highlights the major observations, along with the actions taken thereafter. This would act as an indicator of the developments that have happened in the MoU system in India and, through the study of extant literature, would also highlight the areas of concern raised after each study.

The various committees formed over the years are:

1. Arjun Sengupta Committee Report (1984)
2. National Council of Applied Economic Research (2004)
3. Report of the Working Group (2008)
4. S.K. Roongta Committee Report (2011)
5. Mankad Committee and Task Force (2012)