

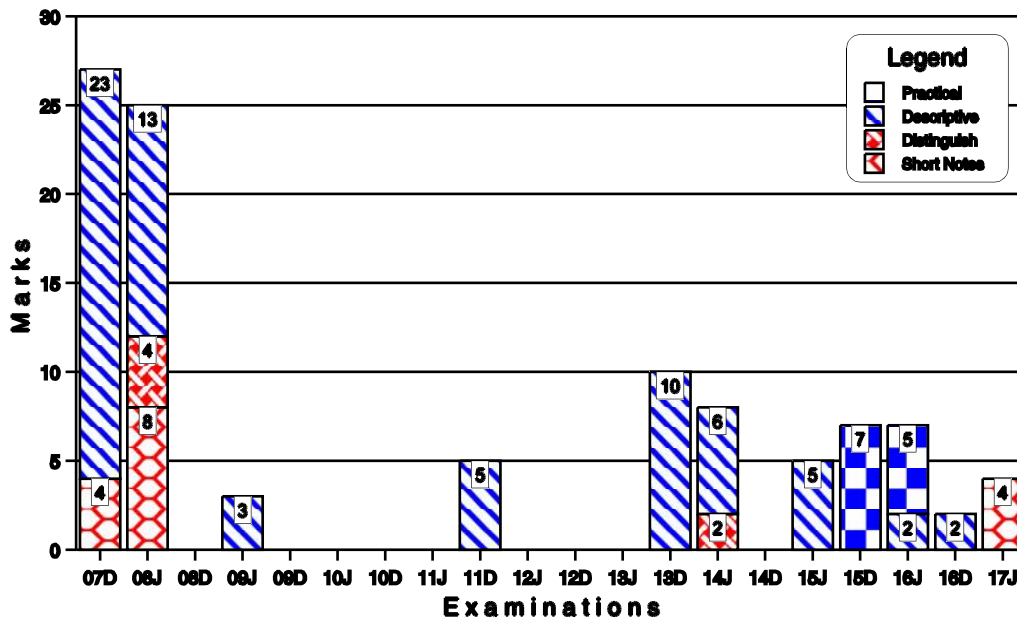
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COMPANY FORMATION AND CONVERSION

THIS CHAPTER INCLUDES

- Incorporation of companies conversions/reconversion/re-registration.
- Nidhi Companies
- Mutual Benefit Funds and Producer Companies
- Formation of "Not-for-Profit" making companies
- Conversion of LLPs into Private Limited Companies and *vice versa*

Marks of Short Notes, Distinguish Between, Descriptive & Practical Questions



CHAPTER AT A GLANCE

S. No.	Topic	Important Highlights
1.	Company	A company is an association of both natural and artificial persons incorporated under the existing law of a country. A company has a separate legal entity from the persons constituting it.
2.	Characteristics of a company	The main characteristics of a company are corporate personality, limited liability, perpetual succession, separate property, transferability of shares, common seal, capacity to sue and be sued, contractual rights, limitation of action, separate management, termination of existence etc.
3.	Doctrine of lifting of or piercing the corporate veil	<ol style="list-style-type: none"> (1) Separate personality of a company is a statutory privilege and it must be used for legitimate business purposes only. (2) Where a fraudulent and dishonest use is made of the legal entity, the individuals concerned will not be allowed to take shelter behind the corporate personality. (3) The Court will break through the corporate shell and apply the principle/doctrine of what is called as "lifting of or piercing the corporate veil".
4.	LLP	<ul style="list-style-type: none"> • It is an alternative corporate business form that gives the benefits of limited liability of a company and the flexibility of a partnership. • LLP can continue its existence irrespective of changes in partners. • It is capable of entering into contracts and holding property in its own name. • LLP is a separate legal entity, and is liable to the full extent of its assets but liability of the partners is limited to their agreed contribution in the LLP.
5.	Corporation	An organization formed under state law for the purpose of carrying on a business enterprise in such a manner as to make the enterprise distinct from its owners.
6.	Illegal association	<ul style="list-style-type: none"> • As per Section 464 of Companies Act, no association or partnership consisting of more than such number of persons as may be prescribed shall be formed for the

		<p>purpose of carrying on any business that has for its object the acquisition of gain by the association or partnership or by the individual members thereof, unless it is registered as a company under this Act or is formed under any other law for the time being in force.</p> <ul style="list-style-type: none"> The number of persons which may be prescribed under this section shall not exceed 100. Rule 10 of Companies (Miscellaneous) Rules, 2014 prescribes 50 persons in this regard.
7.	Types of Company	<p>From the point of view of incorporation, companies can be classified as chartered companies, statutory companies and registered companies.</p> <ul style="list-style-type: none"> ✓ Companies can be categorized as unlimited companies, companies limited by guarantee and companies limited by shares. ✓ Companies can also be classified as public companies, private companies, one person companies, small companies, associations not for profit having license under Section 8 of the Act, Government Companies, Foreign Companies, Holding Companies, Subsidiary Companies, Associate Companies, Investment Companies and Producer Companies.
8.	Private Company	<p>A private company has been defined under Section 2(68) of the Companies Act, 2013 as a company which has a minimum paid-up capital of ` 1,00,000 or such higher paid-up capital as prescribed and by its articles restricts the right to transfer its shares, limits the number of its members to two hundred and prohibits any invitation to the public to subscribe for any securities of the company.</p> <p>Amendment Made by Companies (Amendment) Act, 2015 <i>Provides that in clause (68), the words "of ` 1 lakh or higher paid up share capital" shall be omitted.</i></p>
9.	One Person Company	<p>One Person Company" means a company which has only one person as a member.</p>

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10.	“Small Company”	‘Small company’ means a company, other than a public company, (i) paid-up share capital of which does not exceed ` 50,00,000 or such higher amount as may be prescribed which shall not be more than ` 5 crores; or (ii) turnover of which as per its last profit and loss account does not exceed ` 2 crores or such higher amount as may be prescribed which shall not be more than ` 20 crores.
11.	Public Company	A public company is a company which (a) is not a private company (b) has a minimum paid-up share capital of ` 5 lakh or such higher paid-up capital, as may be prescribed. Amendment Made by Companies (Amendment) Act, 2015: <i>Provides that in clause (68), the words “of ` 5 lakhs or higher paid up share capital” shall be omitted.</i>
12.	Limited Company	A limited company is a company limited by shares or by guarantee. An unlimited company is a company not having any limit on the liability of its members.
13.	Foreign Company	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.
14.	Investment Company	Investment Company means a company whose principal business is the acquisition of shares, debentures or other securities.
15.	Association not for profit	Section 8(1) permits the registration, under a licence granted by the Central Government, of associations not for profit with limited liability without being required to use the word “Limited’ or the words ‘Private Limited” after their names. The Central Government may grant such a license if: (a) it is intended to form a company for promoting commerce, art, science, sports, education, research, social welfare, religion, charity protection of environment or any such other object; and (b) the company prohibits payment of any dividend to its members but intends to apply its profits or other income in promotion of its

		objects.
16.	Government Companies	A company in which not less than 51% of the paid-up share capital is held by the Central Government, or by any State Government or Governments or partly by the Central Government and partly by one or more State Governments and includes a company which is a subsidiary company of such a Government Company.
17.	Holding Company	As per Section 2 (46), holding company, in relation to one or more other companies, means a company of which such companies are subsidiary companies.
18.	Subsidiary Company	Section 2 (87) provides that subsidiary company or subsidiary, in relation to any other company (that is to say the holding company), means a company in which the holding company— (i) controls the composition of the Board of Directors; or (ii) exercises or controls more than one-half of the total share capital either at its own or together with one or more of its subsidiary companies.
19.	Dormant Companies	As per Section 455 (1) where a company is formed and registered under this Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction, such a company or an inactive company may make an application to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company.
20.	Associate Company	As per Section 2(6), “Associate Company”, in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.
21.	Position of OPC in India under the Companies Act, 2013	As per Section 2(62) of the Companies Act, 2013, “One Person Company” means a company which has only one person as a member. Section 3(1)(c) lays down that a company may be formed for any lawful purpose by one person, where the company to be formed is to be One

		<p>Person Company that is to say, a private company. In other words, one person company is a kind of private company.</p> <p>A One person company shall have a minimum of one director. Therefore, a One Person Company will be registered as a private company with one member and one director.</p>
22.	Procedure for incorporation of a company	<p>(a) Application for Availability of Name of Company;</p> <p>(b) Preparation of Memorandum and Articles of Association;</p> <p>(c) Filing of Documents With Registrar of Companies;</p> <p>(d) Declaration from the professional;</p> <p>(e) Affidavit from the subscribers to the Memorandum;</p> <p>(f) Furnishing verification of Registered Office</p> <p>(g) Filing of particulars of Subscribers</p> <p>(h) Filing particulars of first directors along with their consent to act as directors</p> <p>(i) Power of Attorney : Execution of power of attorney on a non-judicial stamp paper of a value prescribed in state stamp laws.</p> <p>(j) Issue of Certificate of Incorporation by Register.</p>
23.	Conclusive evidence	<p>The certificate of incorporation is conclusive evidence that everything is in order as regards registration and that the company has come into existence from the earliest moment of the day of incorporation stated therein.</p>
24.	Private company to public company	<p>Pass special resolution in general meeting File form INC 27 with Registrar File MGT 14 for special resolution.</p>
25.	Public to private company	<p>Pass Special Resolution in general meeting File form INC 27 with Registrar Get NCLT's approval File MGT. 14 for special resolution .</p>
26.	Conversion of Section 8 company to any other kind	<ul style="list-style-type: none"> • Pass special Resolution in general meeting along with MGT 14 • Application to Regional Director in Form INC 18 (copy to be filed with Registrar) Publication of notice (INC 19) in news paper • Declaration to the effect that no dividend/ bonus is paid

		<ul style="list-style-type: none"> • NOC from the relevant regulatory authority • No failure in filing financial statement certificate from PCS/CA/CMA for conversion compliance.
27.	Conversion of one person company to a public company or private company	<ul style="list-style-type: none"> • If the paid up capital of an OPC exceeds ` 50,00,000. Or • Its average annual turnover during the relevant period exceeds ` 2 crore. Then it shall cease to be entitled to continues OPC. • Minimum number of members and directors has to be increased accordingly. Pass special Resolution in General Meeting to alter MOA & AOA Notice to Registrar within 60 days in INC 5.
28.	Conversion of pvt company into one person company	<p>Private company other than section 8 company having paid up share capital of ` 50,00,000 or less or Average annual turnover during the relevant period is ` 2 crore or less</p> <ul style="list-style-type: none"> • Before passing resolution the company shall obtain NOC from members & creditors then pass S/R in General Meeting • The company shall file an application in INC 6 for its Conversion • Declaration by Directors by way of affidavit.
29.	465(1)	<p>Proviso to 465(1) states that provisions of Part IX A of the Companies Act, 1956 shall be applicable mutatis mutandis to a Producer Company in a manner as if the Companies Act, 1956 has not been repealed until a Special Act is enacted for Producer Companies.</p>
30.	'Producer'	<ul style="list-style-type: none"> • A 'Producer' shall mean any person engaged in any activity connected with or relatable to any primary produce. • The amendment also seeks to provide a comprehensive meaning to primary produce which shall encompass produce of farmers, arising from agriculture (including animal husbandry, horticulture, etc.) produce of persons engaged in handloom, handicraft, any product resulting from any of the above activities or from an ancillary activity and any activity which is intended to increase the production or quality of anything referred above.

31.	Objectives of Producer Companies	Objectives for which Producer Companies may be formed include <i>inter alia</i> , <ul style="list-style-type: none"> • production, marketing, • export of primary produce of members, • processing, packaging of produce of its members, manufacture, • sale of machinery etc. mainly to its members, generation and distribution of power, • insurance of producers/primary produce, • rendering technical/ consultancy services, • promoting mutual assistance, • welfare measures and any other activity for the benefit of members.
32.	No. of Producer	The Act provides that, any ten or more individuals, each of them being a producer or two or more producer institutions or a combination of ten or more individuals and producer institutions, desirous of forming a producer company may form an incorporated company, as such having its objects specified under this Act after complying with the requirements and the provisions of the Act in respect of registration.
33.	Voting in Producer Companies	Unless the membership of the Producer Company consists of a Producer Institution only, every member shall have a single vote irrespective of the number of shares held. Further, every such member shall be entitled to receive a limited return and may be allotted bonus shares.
34.	Memorandum of Association	<ul style="list-style-type: none"> • The Memorandum of Association is a document which sets out the constitution of the company and is the foundation on which the structure of the company stands. • It defines as well as confines the powers of the company. • If the company enters into contract or engages in any trade or business which is beyond the powers conferred on it by the memorandum, such a contract or the act will be <i>ultra vires</i> the company and hence void.
35.	Clauses	Memorandum of Association consists of: <ol style="list-style-type: none"> (a) Name Clause (b) Situation Clause

		<ul style="list-style-type: none"> (c) Object Clause (d) Liability Clause (e) Capital Clause (f) Subscription Clause
36.	Articles of Association	<ul style="list-style-type: none"> • Articles mean the articles of association of a company as originally framed or as altered from time to time in pursuance of any previous company law or of this Act. • The articles include the regulations contained in Tables F to J in Schedule I of the Act, in so far as they apply to the company.
37.	Alter its articles of association	<ul style="list-style-type: none"> • A company has a statutory right to alter its articles of association. • But the power to alter is subject to the provisions of the Act and to the conditions contained in the memorandum. • Any alteration so made shall be as valid as if originally contained in the articles.
38.	Registration of MOA/AOA	The memorandum and articles, when registered, bind the company and its members to the same extent as if they have been signed by the company and by each member to observe and be bound by all the provisions of the memorandum and of the articles.
39.	Alteration of Memorandum of Association	<p>(1) Name Change:</p> <ul style="list-style-type: none"> - Pass Special Resolution - Approval of Central Government - To delete the word "private" approval from the name, Central Government is not required in case of conversion of private company to public company. <p>(2) Change in Registered Office:</p> <p>(a) Change within local limits:</p> <ul style="list-style-type: none"> • Pass Board Resolution and Special Resolution Notice of change to Registrar in INC 22 within 15 days of such change <p>(b) Change of State:</p> <ul style="list-style-type: none"> • Approval of Central Govt. In INC 23 the Approval should be registered with Registrar for Incorporation Certificate <p>(c) Change in jurisdiction of Registrar:</p>

		<ul style="list-style-type: none"> • Get confirmation by Regional Director Communication of confirmation by Regional Director to the company within 30 days. <p>(3) Change in Liability:</p> <ul style="list-style-type: none"> • Needs Special Resolution to be passed. • File the same with Registrar in form MGT 14. <p>(4) Change in Capital:</p> <ul style="list-style-type: none"> • alteration of capital clause to be authorised by the Articles of Association [Section 61]; Ordinary Resolution
40.	Doctrine of constructive notice	<ul style="list-style-type: none"> • As per doctrine of constructive notice, every person dealing with the company is deemed to have a “constructive notice” of the contents of its memorandum and articles. Outsiders dealing with incorporated bodies are bound to take notice of limits imposed on the corporation by the memorandum or other documents of constitution. • Nevertheless they are entitled to assume that the directors or other persons exercising authority on behalf of the company are doing so in accordance with the internal regulations as set out in the Memorandum & Articles of Association.
41.	Doctrine of indoor management	<ul style="list-style-type: none"> • While the doctrine of constructive notice seeks to protect the company against the outsiders, the doctrine of indoor management operates to protect the outsiders against the company. • While persons contracting with a company are presumed to know the provisions of the contents of the memorandum and articles, they are entitled to assume that the provisions of the articles have been observed by the officers of the company. • However, there are certain exceptions to doctrine of indoor management.

42.	Doctrine of ultra vires	In the case of a company whatever is not stated in the memorandum as the objects or powers is prohibited by the doctrine of ultra vires (The word 'ultra' means beyond and the word 'vires' means powers).
43.	Nidhi Companies	<p>(a) As per Section 406 of the Companies Act, 2013, 'Nidhi' means a company which has been incorporated as a Nidhi with the object of:</p> <ol style="list-style-type: none"> 1. cultivating the habit of thrift and savings amongst its members 2. receiving deposits from, and lending to, its members only, for their mutual benefit, and 3. which complies with such rules as are prescribed by the Central Government for regulation of such class of companies. <p>(b) The Central Government may, by notification, direct that any of the provisions of this Act shall not apply, or shall apply with such exceptions, modifications and adaptations as may be specified in that notification, to any Nidhi or Nidhis of any class or description as may be specified in that notification.</p>
44.	Requirements for Minimum Number of Members, Net Owned Fund etc.	<p>(a) Every Nidhi shall, within a period of one year from the commencement of these rules, ensure that it has:</p> <ol style="list-style-type: none"> 1. Not less than two hundred members. 2. Net Owned Funds of ten lakh rupees or more. 3. Un-encumbered term deposits of not less than ten per cent of the outstanding deposits as specified in rule 14 and 4. Ratio of Net Owned Funds to deposits of not more than 1:20.

List of Important Forms

Form No.	Form Type	Purpose of Form as per Companies Act, 2013	Important Section	Important Rule
INC-1	e-Form	Application for reservation of Name	4(4)	8, 9

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INC-2	e-Form	One Person Company - Application for incorporation	3(1), 7(1)	4,10, 12,15
INC-3	e-Form	One Person Company –Nominee Consent Form	3(1)	4(2), (3), (4), (5), (6)
INC-4	e-Form	One Person Company – Change in Member/Nominee	3(1)	4(4), (5), (6)
INC-5	e-Form	One Person Company - Intimation of exceeding threshold	–	6 (4)
INC-6	e-Form	One Person Company – Application for Conversion	18	7 (4)
INC-7	e-Form	Applicant for incorporation of Company (Other than OPC)	7(1)	10, 12, 14, 15
INC-8	Physical Form	Declaration	7(1)(b)	14
INC-9	Physical Form	Affidavit	7(1)(c)	15
INC-10	Physical Form	Form for verification of signature of subscribers	–	16 (1) (q)
INC-11	Physical Form	Certificate of Incorporation	7(2)	8
INC-12	Physical Form	Application for grant of License under section 8	8(1), 8(5)	19, 20
INC-13	Physical Form	Memorandum of Association	–	19 (2)
INC-14	Physical Form	Declaration	7(1)(b)	19 (3) (b)
INC-15	Physical Form	Declaration	–	19 (3) (d)
INC-16	Physical Form	Licence under section 8(1) of the Companies Act, 2013	–	20
INC-17	Physical Form	Licence under section 8 (5) of the Companies Act, 2013	–	20
INC-18	e-Form	Application to Regional Director for conversion of Section 8 company into company of any other kind	8 (4) (ii)	21(3)
INC-19	e-Form	Notice	–	22
INC - 20	e-Form	Intimation to Registrar of revocation/surrender of license issued under section 8	8 (4),8(6)	23

INC - 21	e-Form	Declaration prior to the commencement of business or exercising borrowing powers	11(1) (a)	24
INC - 22	e-Form	Notice of situation or change of situation of registered office	12(2), (4)	25, 27
INC - 23	e-Form	Application to the Regional Director for approval to shift the Registered Office from one state to another state or from jurisdiction of one Registrar to another Registrar within the same State	12 (5), 13(4)	28, 30
INC - 24	e-Form	Application for approval of Central Government for change of name	13 (2)	29 (2)
INC - 25	Physical Form	Certificate of Incorporation pursuant to change of name	–	29
INC - 26	Physical Form	Advertisement to be published in the newspaper for License for existing companies	–	30
INC - 27	e-Form	Conversion of public company into private company or private company into public company	14	33
INC - 28	e-Form	Notice of Order of the Court or any other competent authority	–	–

SHORT NOTES

2007 - Dec [8] (a) Write short note on the following:

(iv) Illegal association.

(4 marks)

Answer:

As per the provisions of **Section 464 of the Companies Act, 2013**, no association or partnership consisting of more than such number of persons as may be prescribed shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the association or partnership or by the individual members thereof, unless it is registered as a company under this Act or is formed under any other law for the time being in force. The number of persons which may be prescribed under this section shall not exceed 100.

Exception: This section does not apply to:

(a) Hindu Undivided Family or

(b) An association or partnership formed by professionals who are governed by special Acts like LLP.

As per rule 10 of Companies (Miscellaneous) Rules, 2014 as notified on **1st April, 2014** prescribes 50 persons.

Therefore, the any unregistered association shall be treated as illegal association provided such association has more than 50 members.

Effects of an illegal association: An illegal association:

- (i) Cannot enter into any contract.
- (ii) Cannot sue any member, or outsider, not even if the company is subsequently registered.
- (iii) Cannot be sued by a member, or an outsider for recovery of any debts.
- (iv) Cannot be wound up by an order of the Court/Tribunal. In fact, the Court/Tribunal cannot entertain a petition for winding up as an unregistered company, for if it did, it would be indirectly according recognition to the illegal association. **[Raghubar Dayal Vs. Sarafa Chamber AIR 1954 All. 555]**

However, an illegal association is liable to be taxed. **[Kumara Swamy Chattiar Vs. Income Tax Officer (1957) I.T.R.457].**

The members of an illegal association are individually liable in respect of all acts or contracts made on behalf of the association; they cannot either individually or collectively, bring an action to enforce any contract so made, or to recover any debt due to the association. **[Wilkinson Vs. Levison (1925) 42 T.L.R. 97].**

Penalty [Section 464(3)]: Every member of an illegal association shall be punishable with fine which may extend to ` 1 lakh and shall also be personally liable for all liabilities incurred in such business.

Maximum Number of a Partnership Firm: As per **Companies Act, 2013** prescribes maximum number of partners (i.e. 50) for a partnership formed under the **Partnership Act, 1932** other than LLP. No limit for partners in the "Limited Liability Partnership (LLP)". As per the **Companies Act, 2013** no separate limit specified for banking or other business. Earlier, this limit was 10 in case of banking business & 20 in case of other business in accordance with the **Companies Act, 1956**.

Note: *If two or more joint Hindu family firms carry on business together and the combined number of major members exceeds 50, then their association will become illegal. In computing the number for illegal association, minor members of joint families are to be ignored. If by reason of minor members of such joint families on attaining majority, the number of persons exceeds the statutory limit, it will become an illegal association.*

Consequences of an Illegal Association :

- (i) The law doesn't recognize it, i.e. in the eyes of law it does not have legal existence.
- (ii) It can't enter into any contract.

- (iii) It can't sue any of its members or outsiders.
- (iv) Every member of an illegal association shall be personally liable for all liabilities incurred in such business. Apart from those unlimited personal liability, members are punishable with a fine which may extend upto ` 1,00,000.
- (v) It cannot be bound under the provisions of the Companies Act, even under the provisions relating to winding up of unregistered companies.

2008 - June [4] Write short note on the following:

- (i) Government company (4 marks)
- (ii) Doctrine of *ultra vires* (4 marks)

Answer:

- (i) **Government Company:** According to **Section 2(45) of Companies Act, 2013**, a Govt. Company means any company in which not less than 51% of paid - up Share Capital held by :
 - (i) The Central Govt. or
 - (ii) One or more State Government.
 - (iii) Partly by Central Govt. and partly by one or more State Govt.
 It should be noted that a Govt. Company is not a department of the State. A Subsidiary Govt. Company is also a Govt. Company.
 Rules Applicable to Govt. Company.

Note:

- *Annual Report to be placed before Parliament under **Section 394 and 395 of Companies Act, 2013.***
- *Under this Act, where the Central Govt. is a member of govt company.*
- *The Central Govt. must prepare an annual report on the working of the company.*
- *The report must be ready within 3 months of the company's Annual general meeting. The report is to be placed before both houses of Parliament together with a copy of audit report and comments of Comptroller and Auditor General of India.*

(ii) **Doctrine of Ultra Vires:**

- Ultra means beyond and Vires mean powers. *Ultra Vires* means beyond powers. Any action of the company is *Ultra Vires* if such action is not authorised in the MOA.
- The MOA defines and confines the powers of the company and company can operate only within the scope of the authority given to it by its **MOA and Companies Act, 2013.**
- Any action beyond the scope of **MOA or Companies Act, 2013** is *Ultra Vires* of the company.
- It is also clear that the company cannot ratify such action or make such action valid, even if every member assents to it.
- Whatever was *ultra vires* the company will remain *ultra vires*.
- Any action which is *ultra vires* to the directors or BOD but *intra*

- vires* to the company, can be ratified by the company.
- If any act is *ultra vires* to the directors the body of shareholders can ratify it.

2017 - June [8] Write short notes on the following:

(a) Producer Companies

(4 marks)

DISTINGUISH BETWEEN

2008 - June [8] Distinguish between the following:

- (iii) 'Certificate of incorporation' and 'certificate of commencement of business'.

(4 marks)

Answer:

Certificate of Incorporation	Certificate of Commencement of business
It is birth certificate of company.	It is birth certificate of business of company.
It is must for every company.	A private company or a public company without share capital, can commence business without getting this certificate.
Before this, the contracts are called preliminary contracts.	Before this, the contracts are called provisional contracts. Company can raise share capital only after obtaining Certificate of commencement of business.

Amendment made by Companies (Amendment) Act, 2015:

Provides that Section 11 Pertaining to commencement of business certificate to be omitted.

2014 - June [6] (d) State the distinction between a Mandatory provision and a Directory provision.

(2 marks)

Answer:

Distinction between a mandatory and directory provision:

- The distinction between a provision which is mandatory and one which is 'directory' is that when it 'mandatory', it must be strictly complied with, when it is 'directory', it would be sufficient that it is substantially complied with.
- Non-observance of mandatory provisions involves the consequences invalidating. But non-observance of directory provision does not entail the consequence of invalidating, whatever other consequences may occur.
- Mandatory provision has a compulsory requirements for compliance while directory provisions provide direction and are suggestive in nature, substance and compliance.

DESCRIPTIVE QUESTIONS

2007 - Dec [1] {C} Comment on the following:

- (iv) A certificate of incorporation is the conclusive evidence that all the requirements of the Companies Act, 2013 have been complied with.

(5 marks)

Answer:

- **Certificate of incorporation** is birth certificate of the company. For formation of company, the promoters need to file certain documents with the ROC. After filing the necessary documents and payment of required fees the ROC examines all these documents.
- The ROC requires clarification and explanation from the promoters regarding any points found unsatisfactory to him.
- After he has satisfied himself, he issues a certificate of incorporation to the company certifying that the company has satisfied all conditions of incorporation.
- This is most important document for the company.

Importance of Certificate of Incorporation:

1. It is the conclusive evidence about the birth of the company. The date of birth is the date on which COI has been issued by the ROC.
2. This is conclusive evidence that all the formalities laid down in the **Companies Act, 2013** have been duly complied with.
3. The certificate cannot be challenged on any grounds whatsoever. The company becomes a legal person with perpetual succession and a common seal as soon as this certificate is issued.
4. This certificate grants the company a separate existence. It becomes an artificial person in the eyes of law which is distinct and different from its members. It means the assets and liabilities of a company are not the assets and liabilities of its members.
5. After getting the COI, a private company can commence business immediately but a public ltd. company has to obtain a certificate of commencement of business for starting business.
6. It should be noted that the COI does not endorse the objectives given with MOA. It does not legalize the objectives. It is only for the purpose of incorporation.

2007 - Dec [3] (b) The doctrine of *ultra vires* is a protection to the shareholders of the company. Discuss. **(6 marks)**

Answer:

Please refer 2008 - June [4] (ii) on page no. 35

2007 - Dec [5] (a) Discuss the provisions relating to change of name of a company. **(4 marks)**

Answer:

Procedure for Change of Name of a Company -

A company desiring to change its name may do so in accordance with the

provisions of **Section 13 of the Companies Act, 2013** by following these procedural steps:

1. Issue notice of the Board Meeting to consider the change of name, as per the provisions of **Section 173(3) of Companies Act, 2013** of the Act.
2. Hold the Board Meeting to:
 - (i) consider and approve the proposed name by passing a resolution. The board must consider and decide at least three more names in the application for availability of name to be made to the Registrar of Companies in Form INC 1.
 - (ii) pass another resolution to authorise the Company Secretary/Director to make the required application to the Registrar of Companies in Form INC 1 and pay the prescribed fees.
3. On receipt of name availability letter, hold Board Meeting to fix time, date and venue for holding a General Meeting:
 - (a) for passing a special resolution required under **Section 13 of Companies Act, 2013** for changing the name of the company; and
 - (b) for passing another special resolution under **Section 16 of Companies Act, 2013** for altering Clause I (name clause) in the Memorandum of Association of the company in accordance with **Section 13 of Companies Act, 2013**.
4. Issue notice of the General Meeting to all the members of the company, its directors and the auditors.
5. In the case of listed companies, send three copies of the notice to each Stock Exchange where the securities of the company are listed.
6. A general notice of the General Meeting may also be published in newspapers.
7. Hold the General Meeting and pass the resolutions as contained in the notice.
8. Listed companies shall send six copies to each stock exchange.
9. A copy of the proceedings of the General Meeting be sent to each Stock Exchange.
10. File with the ROC Form MGT 14 with a certified true copy of each special resolution passed at the General Meeting alongwith the explanatory statement and prescribed filing fee.
11. Make an application to the concerned Registrar of Companies for obtaining Central Government's approval to the change of name of the company.
12. On receipt of the Central Government's approval, the existing Certificate of Incorporation be surrendered to ROC with a request for the issue of a fresh Certificate of Incorporation.
13. Issue a general notice in newspapers, about the change of name of the company.

2007 - Dec [7] (a) What is 'corporate veil'? State the circumstances when it can be lifted.

(8 marks)

Answer:

Corporate Veil:

Company is a legal person and is distinct from its members. Its assets are separate and distinct from those of its members. Since a company being an artificial person, is not capable of doing anything illegal or fraudulent. Only members of the company can do such fraudulent work.

Therefore, a company has to identify the person who are really guilty. This is known as lifting of corporate veil.

The circumstances under which, the NCLT may lift the corporate veil are mentioned under the following two heads.

(a)	Under Statutory Provision	
	<p>Statutory Recognition of Lifting of Corporate Veil</p>	<p>The Companies Act, 2013 itself contains some provisions [Sections 7(7), 251(1) and 339] which lift the corporate veil to reach the real forces of action. Section 7(7) deals with punishment for incorporation of company by furnishing false information; Section 251(1) deals with liability for making fraudulent application for removal of name of company from the register of companies and Section 339 deals with liability for fraudulent conduct of business during the course of winding up.</p>
	<p>1. Submission of false Information [Section 7(7)]</p>	<p>Without prejudice to the provisions of sub-section (6), where a company has been got incorporated by furnishing any false or incorrect information or representation or by suppressing any material fact or information in any of the documents or declaration filed or made for incorporating such company or by any fraudulent action, the NCLT may, on an application made to it, on being satisfied that the situation so warrants:</p> <p>(a) pass such orders, as it may think fit, for regulation of the management of the company</p>

		<p>including changes, if any, in its memorandum and articles, in public interest or in the interest of the company and its members and creditors; or</p> <p>(b) direct that liability of the members shall be unlimited; or</p> <p>(c) direct removal of the name of the company from the register of companies; or</p> <p>(d) pass an order for the winding up of the company; or</p> <p>(e) pass such other orders as it may deem fit.</p>
	<p>2. Fraudulent application for removal of name [Section 251(1)]</p>	<p>1. where it is found that an application by a company under sub-section.</p> <p>2. of Section 248 has been made with the object of evading the liabilities of the company or with the intention to deceive the creditors or to defraud any other persons, the persons in charge of the management of the company shall, notwithstanding that the company has been notified as dissolved:</p> <p>(a) be jointly and severally liable to any person or persons who had incurred loss or damage as a result of the company being notified as dissolved; and</p> <p>(b) be punishable for fraud in the manner as provided in Section 447.</p> <p>3. Without prejudice to the provisions contained in sub-section (1), the Registrar may also recommend prosecution of the persons responsible for the filing of an application under sub-section (2) of Section 248.</p>

3. Liability for fraudulent conduct of business (Section 339)

1. If in the course of the winding up of a company, it appears that any business of the company has been carried on with intent to defraud creditors of the company or any other persons or for any fraudulent purpose, the Tribunal, on the application of the Official Liquidator, or the Company Liquidator or any creditor or contributory of the company, may, if it thinks it proper so to do, declare that any person, who is or has been a director, manager, or officer of the company or any persons who were knowingly parties to the carrying on of the business in the manner aforesaid shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Tribunal may direct.
2. Where the Tribunal makes any such declaration, it may give such further directions as it thinks proper for the purpose of giving effect to that declaration and, in particular, -
 - (a) make provision for making the liability of any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or any interest in any mortgage or charge on any assets of the company held by or vested in him, or any person on his behalf or, any person claiming as assignee from or through the person liable or any person acting on his behalf;

		<p>(b) make such further order as may be necessary for the purpose of enforcing any charge imposed under this sub-section.</p> <p>3. Where any business of a company is carried on with such intent or for such purpose as is mentioned in sub-section (1), every person who was knowingly a party to the carrying on of the business in the manner aforesaid, shall be liable for action under section 447.</p> <p>4. This section shall apply, notwithstanding that the person concerned may be punishable under any other law for the time being in force in respect of the matters on the ground of which the declaration is to be made.</p>
(b)	Judicial Interpretation	
	(i) For the protection of revenue	<p>If a company makes effort to evade tax the NCLT may disregard the corporate veil.</p> <p>As in the case of Sir Dinshaw Maneckjee Petit.</p>
	(ii) For determination of enemy character of company	<p>When there is suspicion that the company is controlled or owned by enemies of the country, then the Court/Tribunal* may lift the corporate veil and examine the character of a person. As in the Case of Daimler Company Ltd. Vs. Continental Tyre and Rubber Company Ltd.</p>
	(iii) Where company is formed for some illegal or improper object	<p>If a company has been formed for some illegal or improper object, the NCLT may disregard, the corporate veil. Here, the illegal object is related with defraud with creditors or to avoid legal obligation.</p>

	(iv) Company acting as agent of shareholders	Generally, a company is not an agent of its shareholders but under certain circumstances a company may be operating as an agent or trustee of its members.
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2008 - June [1] {C} Comment on the following:

- (ii) Registered office of a company can be shifted from one State to another without the approval of the State Government. **(5 marks)**

Answer:

Change of Registered Office from one state to another:

- A special resolution is to be passed in a general meeting and confirmation from Central Government should be obtained.
- The Central Government shall give notice to every person whose interests will be affected by such shifting.
- The Central Government shall also give notice to ROC and ask for his comments.
- The consent of creditors is to be obtained. After listening to all these parties, the Central Government may confirm the shifting.
- The company will file within 3 months of such shifting (i) A certified copy of the order of the Central Government and (ii) Revised MOA; with the ROC.
- The ROC shall register the same and certify the registration of new office within one month from the date of filing of such documents.
- It should be noted here that the state govt. can not object to the change of registered office from one state to other state.

2008 - June [3] (b) An existing company wants to commence a new business. Elucidate the procedure laid down therefor. **(8 marks)**

Answer:

According to the clarification given by the Department of Company Affairs (Now, Ministry of Corporate Affairs), new business means a business which is not germane to the existing business carried on by the company. The guiding criterion is, therefore, whether the new activity is germane to the original business or not. In case the reply is 'yes', no special resolution is necessary and *vice versa*.

Section 4 requires that every company formed on or after October 15, 1965 must state in its memorandum, the main objects to be pursued by the company on its incorporation and objects incidental or ancillary to the attainment of the main objects;

Procedure in case an existing company wants to commence a new business:

1. Call a board meeting after giving notice to all the directors of the company and approve the commencement of new business.
2. Convene the general meeting by passing a special resolution by three-fourth majority.

3. Forward three copies of the notices and a copy of the proceedings of the General Meeting to the Stock Exchange with which the shares of the company are listed. This is required in case of a listed company.
4. File the special resolution with the concerned ROC in e-form MGT-14 within thirty days of the passing thereof.
5. The Central Government, may, however, on application by the Board of directors allow the company to commence new business, even if the special resolution is not passed by the company in general meeting, but passed by a simple majority.

However, the above procedure does not apply to a private company which can commence any new business permitted by the Memorandum of Association after passing a board resolution.

2009 - June [8] (b) "A promoter stands in a fiduciary relation towards the company, he promotes"- Explain. **(3 marks)**

Answer:

A promoter stands in a fiduciary (means faithful specially in terms of money) relation (relation requiring confidence or trust) to the company which he promotes. The promoter in such a situation:

- (i) must not make, either directly or indirectly, any profit at the expenses of the company which is being promoted.
- (ii) must give to the company the benefit of any negotiations or contracts into which he enters in respect of the company,
- (iii) must give full disclosure of all the relevant facts, including any profit and his personal interest in a transaction with the Company.

2011 - Dec [6] (a) MS. SUCHANDA has entered into a transaction with GLAMOUR LTD. for a contract value of ` 40 lacs. The Articles of Association enjoin that contracts above ` 10 lacs should be approved in Board Meeting. Mr. Dhuruv, an officer of the company, produces forged documents to her, which show a resolution having been passed in a Board Meeting approving the contract. Later, the forgery comes to light. MS. Suchanda pleads that she is protected by the Doctrine of Indoor Management-Discuss.

(3 + 2 = 5 marks)

Answer:

Doctrine of Indoor Management:

- Doctrine of constructive notice is to protect the company from outsider.
- The doctrine of indoor management is to protect the outsider from the irregularity and mis-management on the part of company.
- These two doctrines viz. Doctrine of Constructive Notice and Doctrine of Indoor Management are opposite in nature and operation. Doctrine of Constructive Notice says that an outsider is supposed to have knowledge of MOA and AOA of the company, but as far as the internal management is concerned, he is entitled to assume that everything is in order inside the company and there is no irregularity.

- The Doctrine of Indoor Management is not available in certain cases as enumerated below:

1.	Knowledge of irregularity	If the person dealing with the company has prior knowledge of some irregularity, he cannot take the shelter of DOIM. Suppose A Ltd. lent some money to B Ltd. on mortgage of its assets. The procedure as detailed in AOA was not followed. The directors in both the companies were same. In this case the irregularity was in the knowledge of lender before lending, therefore the mortgage is not binding. Doctrine of Indoor Management is not available in such cases.
2.	Negligence	If the person has not observed due diligence on his part. If he has enough facility to find out the irregularity or flaw in the process or document by observing little care, caution or concern, he is assumed to have neglected the responsibility on his part. In such cases of negligence Doctrine of Indoor Management is not available.
3.	Forgery	The DOIM is not applicable where a person relies upon a document that turns out to be fake, false or forged. A company is not liable for the forgeries or falsification on the part of its officers or employees.
4.	Acting beyond the authority	If the officer of a company does something beyond his powers and authority with some third party, the company is not bound. This also comes under the negligence on the part of third party, it should have seen and verified whether the officer is acting within his limits.

2013 - Dec [1] {C} (a) A group of promoters approach you for advice regarding the formation of a guarantee company. Advise them briefly about the types of organizations for which it is suitable to form a guarantee company and the advantages that can be derived by registering a guarantee company. **(4 marks)**

Answer :

- A guarantee company is a suitable form of organisations which are created to serve some social purposes.

- Such a company is generally recommended for non profit organisations which are engaged in some social and philanthropic purposes.
- Formation of Guarantee Company is a convenient and suitable form for association such as clubs, chamber of commerce, trade associations, societies setup for carrying on charitable work etc.

The advantages of a guarantee company are:

- (i) It has most of the advantages enjoyed by a limited company. It has a separate legal entity and can own property, enter into contracts, sue or be sued in regard to its contracts and transactions.
 - (ii) In respect of the transaction of the company, no personal liability is incurred by the members or director. Their liability arises only on winding up.
- A guarantee company is like any other limited company. It has separate legal entity.
 - In a guarantee company the liability of the members is limited.
 - In the case of a company having share capital, it is limited by the nominal amount of shares held by each member.
 - In the case of a company not having share capital, by amounts of guarantee undertaken by the members i.e., the amounts they shall contribute for the repayment of debts of the company in the event of the company being wound up.

2013 - Dec [4] (b) In a limited liability partnership (LLP), what are the requirements relating to minimum and maximum number of partners, designated partners and identification numbers for the designated partners? **(4 marks)**

(d) Is it legally necessary for the every producer company to appoint a whole-time secretary under the provision of The Companies Act, 2013. **(2 marks)**

Answer:

(b) Partners and designated partners in LLP

In the case of a LLP there must be a minimum of two partners.

There is no maximum number prescribed.

Every limited liability partnership shall have at least two designated partners who are individuals and at least one of them shall be a resident in India. The term 'resident' means a person who has stayed in India for a period of not less than one hundred and eighty two days during the immediately preceding one year.

However, in case of a limited liability partnership in which all the partners are bodies corporate or in which one or more partners are individuals and bodies corporate, at least two individuals who are partners of such limited liability partnership or nominees of such bodies corporate shall act as designated partners.

There is also the requirement that each designated partner must have a Designated Partner Identification Number DPIN. This would mean before making the application for registration the person proposing to act as a designated partner must have obtained the DPIN, in this

regard.

- (d) Section 465 of the Companies Act, 2013**, provides that the Companies Act, 1956 shall stand repealed. However, Section 465(1) provides that the provisions of Companies Act, 1956 shall be applicable mutatis mutandis (means same to same, in exactly similar manner) to a Producer Company. Section 581X of the Companies Act, 1956 provides that every producer company having an average turnover exceeding ` 5 crores in each of the three consecutive financial years shall have a whole time secretary who is a member of ICSI.

2014 - June [1] {C} (a) What is the effect of the registration of the Memorandum of Association of a company on

- (i) the subscribers of the Memorandum;
- (ii) such other persons as may from time to time become members of the company;
- (iii) the company and
- (iv) outsiders dealing with the company? **(4 marks)**

(e) A producer company wants to issue bonus shares. You are required to state the relevant provisions of the Companies Act, 2013 in this regard.

(2 marks)

Answer:

(a) When the Memorandum of Association of a company has been registered, it has the following effect:-

- (i) The signatories become members of the company, the entry of their names in the register of members not being legally necessary and they are bound to observe all the provisions of the memorandum.
 - (ii) Such other persons as may from time to time become members of the company are bound by the memorandum, as if it had been signed by them, to observe all the provisions thereof.
 - (iii) The company is bound to observe all the provisions of its memorandum of association, as if it had been signed by the company.
 - (iv) The memorandum of association of a company is a public document, and every person dealing with the company is deemed to have notice of its contents. If a person deals with a company in a way contrary to its memorandum, he must take its consequences.
- (e)**
- Producer Companies are still governed by the Companies Act, 1956 because Section 465(1) of the Companies Act, 2013 provides that provisions of the Companies Act, 1956 shall mutatis mutandis be applicable to the Producer Companies.
 - As per provisions of Sec. 581ZJ of the Companies Act, 1956, any producer company may, upon recommendation of the Board and passing of Resolution in the general meeting, issue bonus shares by capitalization of amounts from General Reserves.
 - Referred to in Section 581ZJ, Bonus shares should be issued in

proportion to the shares held by the members on the date of issue of such shares.

2015 - June [1] Answer the question:

(a) Define the term 'Promoter' as contained in the Companies Act, 2013. **(3 marks)**

Answer:

The Companies Act, 2013 has introduced a new definition of Promoter in Sec. 2(69) of the Act which means a person:

- (a) who has been named as such in a prospectus or is identified by the company in the annual return referred to in **Section 92**; or
- (b) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
- (c) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act.

Provided that nothing in sub-clause (c) shall apply to a person who is acting merely in a professional capacity.

2015 - June [2] (c) (iv) Explain the provisions under the Companies Act for amendment of articles of association of a producer company. **(2 marks)**

Answer:

Amendment of Memorandum and Articles of Association of a Producer Company:

- A producer company may, by special resolution, (objects of a producer company), alter its objects specified in the memorandum.
- A copy of the memorandum as amended, together with a copy of the special resolution duly certified by two directors, shall be filed with the Registrar within thirty days from the date of adoption of the resolution.
- With a view to alter the memorandum so as to change the address of the producer company, from the jurisdiction of one Registrar to the jurisdiction of another Registrar, a special resolution will have to be passed and copies of the special resolution certified by two directors of the producer company shall be filed with both the Registrars, presumably with copies of the altered memorandum within thirty days.
- Each Registrar will record the same and thereafter it will be the responsibility of the Registrar from whose jurisdiction the address (the place) has been shifted to forthwith forward to the other Registrar all the documents with him relating to the producer company concerned.
- In case the change involves shifting of the producer company from one state to another, the confirmation of the Company Law Board is necessary.

2016 - June [4] (a) (ii) Is it legally necessary for the every producer company to appoint a whole-time secretary under the provision of the Companies Act, 1956. **(2 marks)**

Answer:

Under section 581X of the Companies Act, 1956 every producer company having an average turnover exceeding ` 5 crores in each of three

consecutive financial years shall have a whole time secretary who is a member of ICSI.

2016 - Dec [2] (c) (ii) Is it obligatory for every producer company to appoint a whole-time Secretary under the provisions of the Companies Act, 1956?
(2 marks)

Answer:

Please refer 2016 - June [4] (a) (ii) on page no. 53

PRACTICAL QUESTIONS

2015 - Dec [1] (A) An association of 120 persons has been formed with the object of acquisition of gain. Now, due to an internal mismanagement, the said association has applied for being wound up under the provisions of the Companies Act, 2013. Advise.
(3 marks)

Answer:

- According to Section 464 of the Companies Act, 2013, no association or partnership consisting of more than prescribed number of persons shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the association or partnership or by the individual members thereof, unless it is registered as a company under the Companies Act, or is formed under any other law for the time being in force. Further, the prescribed number of persons shall not exceed 100.
- The association as mentioned in the question exceed the prescribed number of members i.e., it consists of 120 members and it is not registered as a company under the Companies Act, 2013.
- Where an association is formed, which has membership in excess of the number aforementioned, will be an illegal association except it is registered as company under Companies Act, 2013.
- Such a body will have no legal existence and it cannot be wound up under the Companies Act, 2013, or even as an unregistered company. Neither any member of it would be able to sue it nor would it be able to sue the member.
- Further, every member of an association or partnership carrying on business in contravention of above law, shall be punishable with fine which may extend to one lakh rupees and shall also be personally liable for all liabilities incurred in such business.

2015 - Dec [2] (C) (ii) Under provisions of Companies Act, 1956, relation to producer company, examine whether the office of director of such company shall fall vacant in the following circumstances:

- (a) X, a Director of P.K.R. Ltd., a producer company has made a default in payment of loan taken from a company and default continues for 60 days.

- (b) Z, a Director of the above company could not call the Annual General Meeting for the company due to some natural calamity which occurred three days before the schedule date. **(4 marks)**

Answer:

Producer company – Vacation of Office of a Director:

- (a) According to provisions of Companies Act, 1956, as contained in Section 581Q, if the producer company in which a director has made a default in repayments of any advances or loans taken from any company or institution or any other person and such default continues for 90 days, the office of such director shall become vacant. In the given case the default on the part of X, the director continues for less than 90 (i.e. only 60 days) days, the office of director shall not fall vacant.
- (b) The office of director of a producer company shall become vacant if the Annual General Meeting or extraordinary general meeting of the producer company, in which he is a director, is not called in accordance with the provisions of this Act except due to natural calamity or such other reason. In the given case since the Annual General Meeting could not be held due to some natural calamity, the office of Z, the director shall not fall vacant. This is an exception.

2016 - June [3] (b) The promoters of Welcome Company incorporated on 8th June, 2015 has entered into a contract with A on 10th May, 2015 for supply of goods. After incorporation, the company does not want to proceed with the contract. As a company advisor, advise the management of the company, referring to the provisions of the Companies Act, 2013.

(5 marks)

Answer:

- (i) It is not only the company which is allowed, under the Specific Relief Act, to adopt and enforce its pre-incorporation claims against third parties, Section 19 of the Specific Relief Act also allows, the other party to enforce the contract against the company if (i) the company had adopted the same after incorporation, and (ii) the contract is warranted by the terms of incorporation. Contracts like preparation and printing of the memorandum, and articles, remunerating the professionals, if any, for securing the registration of the company, renting premises, hiring secretarial staff are envisaged under the Act.
- (ii) Pre-incorporation contracts in general are *void ab initio*, and hence not binding on the company. However, under section 19(e) of the Specific Relief Act, 1963, the party to the contract can enforce the contract against the company, if:
- (a) The company had adopted the same after incorporation, and
- (b) The contract is warranted by the terms of incorporation.
- Thus, unless the company adopts the contract, the other party cannot enforce the same against the Company. There shall be no personal liability for the Promoter, if the agreement provides that:

- (i) His liability shall cease once the Company adopts the agreement, and
- (ii) Either party may rescind the agreement, if the Company does not adopt it within a specified time.

Repeatedly Asked Questions		
No.	Question	Frequency
1	The doctrine of ultra vires is protection to the shareholders of the company. Discuss. 07 - Dec [3] (b), 08 - June [4] (ii)	2 Times
2	Is it legally necessary for the every producer company to appoint a whole-time secretary under the provision of the Companies Act, 1956. 16 - June [4] (a) (ii), 16 - Dec [2] (c) (ii)	2 Times

Table Showing Marks of Compulsory Questions										
Year	12 D	13 J	13 D	14 J	14 D	15 J	15 D	16 J	16 D	17 J
Descriptive			4	6						
Total			4	6						