GUIDELINE ANSWERS

PROFESSIONAL PROGRAMME

DECEMBER 2020

MODULE 1

THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament
(Under the jurisdiction of Ministry of Corporate Affairs)
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The Guideline Answers contain the information based on the Laws/Rules applicable at the time of preparation. However, students are expected to be well versed with the amendments in the Laws/Rules made upto **six** months prior to the date of examination.

C O N T E N T S

PROFESSIONAL PROGRAMME EXAMINATION

DECEMBER 2020

ADVANCED COMPANY LAW AND PRACTICE

Time allowed : 3 hours *Maximum marks : 100*

NOTE: *1. Answer **ALL** Questions.*

2. All references to sections relate to the Companies Act, 2013 unless stated otherwise.

Question 1

(a) A company acquired a property from another Company 'ZOOM Ltd.'. The acquired property was subject to a charge created in favour of a third company. Acquiring company did not register the charge. Explain the liability of the acquiring company in relation to such acquisition of the property which was subject to a charge under the provisions of the Companies Act, 2013. (5 marks)

(b) The Board of Directors of Oriental Ltd. have unanimously decided and resolved to incur capital expenditure of ₹20 crore on purchase of immoveable property for business of the Company. Out of that, it was contemplated to pay an advance of 20% immediately.

Pending final confirmation of minutes of such meetings, can the Company pay the advance amount of ₹4 crore against purchase of such property? Explain the provisions. (5 marks)

(c) "Section 8 company can be converted into a company of any other kind." Explain the Provisions. (5 marks)

(d) Solitaire Ltd. has a huge balance in securities premium account. It has utilised the amount for issue of bonus shares to its existing members, written-off preliminary expenses, paid commission and discount on issue of shares of the company, purchased its own shares and redeemed preference shares of the company. As an Internal Auditors of the Company, check the correctness of these transactions against such utilisation of securities premium amount. List out your objections as applicable to Solitaire Ltd. (5 marks)

Answer 1(a)

Section 79 of the Companies Act, 2013 makes it clear that the requirement of registering the charge as provided under Section 77 of the Companies Act, 2013 shall also apply to:

(a) A company acquiring any property subject to a charge; or

(b) Any modification in the terms or conditions or the extent or operation of any charge registered under Section 77 of the Companies Act, 2013.

According to Rule 3 of the Companies (Registration of Charges) Rules, 2014, the particulars of properties acquired by a company subject to charge must be filed with the Registrar of Companies within 30 days of the date of creation/modification of the charge.

Rule 5 of the Companies (Registration of Charges) Rules, 2014 provides that the provisions of Rule 4 of the Companies (Registration of Charges) Rules, 2014 pertaining to delay in filing the particulars and instrument of charge shall apply, mutatis mutandis, to the registration of charge on any property acquired subject to such charge and modification of charge under Section 79 of the Companies Act, 2013.

Accordingly, when a company acquires properties subject to charge, it has a statutory duty to file the charge on such properties with the Registrar of Companies in Form CHG-1, within a period of 30 days of the date of creation of the charge. But in case of non-filing of the particulars of charge, within the stipulated period, the application is required to be made in the E-Form CHG-I to the Registrar of Companies, supported by a declaration from the company signed by its company secretary or a director that such belated filing has not adversely affected the rights of any other intervening creditors of the company.

Answer 1(b)

Any resolution passed by the Board of Directors of the Company shall be deemed to be effective from date of passing of such resolution or date as may be mentioned in the said resolution.

Section 118 of the Companies Act, 2013 provides that Minutes of meetings of Board of Directors is required to be prepared, signed and kept within 30 days of the conclusion of the meeting. It should be signed by the Chairman of the said meeting or the Chairman of the next succeeding meeting.

The Karnataka High Court in *Karnataka Bank Ltd.* vs. *AB Datar* observed that there is no provision in the articles of association or in the Companies Act requiring the minutes to be confirmed before they are acted upon. The implementation of the decisions of the board of directors cannot be deferred till the Minutes are confirmed at a subsequent meeting. The confirmation of Minutes is only to ensure correctness of the recordings of the Minutes.

Hence, confirmation of minutes is not necessary before implementation of resolution. As such, the said advance, may be paid as decided by the Board in its meeting.

Answer 1(c)

Section 8(4)(ii) of the Companies Act, 2013 provides that, a company registered under section 8 may convert itself into a company of any other kind only after complying with conditions as prescribed in the Rule 21 & 22 of the Companies (Incorporation) Rules, 2014.

- The company is required to pass a special resolution at a general meeting for approving such conversion.
- The explanatory statement annexed to the notice convening the general meeting shall set out in detail the reasons for opting for such conversion.
- A certified true copy of the special resolution along with a copy of the Notice convening the meeting including the explanatory statement shall be filed with the Registrar of Companies in **Form No.MGT.14** along with the fee.
- The company shall file an application in **Form No.INC.18** with the Regional Director with the fee along with a certified true copy of the special resolution and

a copy of the Notice convening the meeting including the explanatory statement for approval for converting itself into a company of any other kind and the company shall also attach the proof of serving of the notice served to all the statutory authorities namely:

- The Chief Commissioner of Income Tax having jurisdiction over the company,
- Income Tax Officer who has jurisdiction over the company,
- The Charity Commissioner,
- The Chief Secretary of the State in which the registered office of the company is situated,
- Any organisation or Department of the Central Government or State Government or other authority under whose jurisdiction the company has been operating.

- Declaration shall be given by the Board of Directors to the effect that no part of property or income of the Company has been directly or indirectly transferred or paid by way of dividend or bonus or otherwise to persons who are or have been members of the company or to any one or more of them or to any persons claiming through any one or more of them.
- Where the company has obtained any special status, privilege, exemption, benefit or grant(s) from any authority, a "No Objection Certificate" must be obtained, if required and file with the Regional Director, along with the application.
- The company should have filed all its financial statements and Annual Returns, upto the financial year preceding the submission of the application to the Regional Director and all other returns required to be filed under the Companies Act, 2013 up to the date of submitting the application to the Regional Director. In case, an application is filed and 3 months have expired from the preceding date of Financial year to which financial statement has been filed, then, a statement of financial position duly certified by the Chartered Accountant up to the date of not preceding 30 days of filing the application needs to be attached.
- Along with the application, the Company shall also need to attach a Certificate from a Practicing CA/CS/CMA certifying that all the conditions relating to the conversion of Section 8 company as laid down in the Companies Act, 2013 has been duly complied with.
- A copy of the application with annexures as filed with the Regional Director shall also be filed with the Registrar.
- The company shall, within a week from the date of submitting the application to the Regional Director, publish a notice at its own expense, and a copy of the notice, as published, shall be sent forthwith to the Regional Director and the said notice shall be in **Form No. INC.19** and shall be published-

  (a) at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and having a wide circulation in that district, and at least once in English language in an English newspaper having a wide circulation in that district; and

(b) on the website of the company, if any, and as may be notified or directed by the Central Government.

- The company shall send a copy of the notice, simultaneously with its publication, together with a copy of the application and all attachments by registered post or hand delivery, to all the statutory authorities mentioned above and if any of these authorities wish to make any representation to Regional Director, it shall do so within sixty days of the receipt of the notice, after giving an opportunity to the Company.
- The Regional Director may require the applicant to furnish the approval or concurrence of any particular authority for grant of his approval for the conversion and he may also obtain the report from the Registrar.
- Upon satisfaction, the Regional Director shall issue an order approving the application of conversion of Section 8 company to any company of the other kind, subject to all prevailing terms and conditions as may be imposed in the facts and circumstances of each case including the following conditions, namely:

  (a) the company shall not claim, with effect from the date its conversion, any special status, exemptions or privileges that it enjoyed by virtue of having been registered under the provisions of section 8 of the Companies Act, 2013;

  (b) if the company had acquired any immovable property free of cost or at a concessional cost from any government or authority, it may be required to pay the difference between the cost at which it acquired such property and the market price of such property at the time of conversion either to the government or to the authority that provided the immovable property;

  (c) any accumulated profit or unutilized income of the company brought forward from previous years shall be first utilized to settle all outstanding statutory dues, amount is due to lenders claims of creditors, suppliers, service providers and others including employees and lastly any loans advanced by the promoters or members or any other amounts due to them and the balance, if any, shall be transferred to the investor Education and Protection Fund within 30 days of receiving the approval for conversion;

- Before imposing the conditions or rejecting the application, the company shall be given a reasonable opportunity of being heard by the Regional Director.
- On receipt of the approval of the Regional Director

  (i) The company shall convene a general meeting of its members to pass a special resolution for amending its memorandum of association and articles of association as required under the Companies Act, 2013 consequent to the conversion of the section 8 company into a company of any other kind.

  (ii) The Company shall thereafter file with the Registrar:

  - A certified copy of the approval of the Regional Director within thirty days from the date of receipt of the order in **Form NO. INC.20** along with the fee;

- Amended memorandum of association and articles of association of the company
- A declaration by the directors that the conditions, if any imposed by the Regional Director have been fully complied with.

- On receipt of the documents as mentioned above, the Registrar shall register the documents and issue the fresh Certificate of Incorporation.

Answer 1(d)

According to section 52 of the Companies Act, 2013 securities premium may be utilised for followings;

a) Towards the issue of unissued shares of the company to the members of the company as fully paid bonus shares;

b) In writing off the preliminary expenses of the company;

c) In writing off the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company;

d) In providing for the premium payable on the redemption of any redeemable preference shares or of any debentures of the company; or

e) For the purchase of its own shares or other securities under section 68 of the Companies Act, 2013

According to Section 55 of the Companies Act, 2013, preference shares can be redeemed only out of the profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of such redemption.

Hence, no company can utilise amount available in securities premium account for redemption of preference shares. **Thus, Solitaire Ltd. has rightly utilised the securities premium amount for all specified purposes except for the purpose of redemption of preference shares out of securities premium amount.**

Attempt all parts of either Q. No. 2 or Q.No 2A

Question 2

(a) KK Ltd. is a company registered in the year 2017. Its share holding pattern is dispersed with 15% promoter and promoter group shareholding, 10% Pension fund, 50% state government shareholding and 25% public shareholding. The company made a donation in the year 2019 general elections. Discuss whether such donation could be regarded as legal donation or not and what will be the liability of the company in such regard? Explain the relevant provisions.

(4 marks)

(b) Surtaal Ltd., has three directors on the Board. Two Directors resigned and in their place, two persons were named for appointment of Directors on the Board and their consent was sought for and obtained by the Company. But they did not possess DIN at the time of attending the Board Meeting.

The Board passed a resolution in the same meeting authorizing the Company to advance moneys for conduct of business activities.

Is the resolution passed by the Board of Directors valid of which two directors are not having DIN? What would be your answer if this Company is a Private Limited Company? Explain the Provisions. *(4 marks)*

(c) *Narrate briefly the importance of Corporate Governance Report and also state who can certify the compliance of such report. Explain the relevant provisions of SEBI (Listing Obligations & Disclosure Requirement) Regulations, 2015.* *(4 marks)*

(d) *Specify the procedure where the first auditor is not appointed by the Board of Directors.* *(4 marks)*

OR (Alternate question to Q. No. 2)

Question 2A

(i) *Camping Ltd. was incorporated in the year 2010 for running a lawful business. It came up with a public issue and listed its securities on a regional stock exchange. It has no outstanding loan and no inquiry is pending against it but it is not carrying on any business for last two financial year. The Company wants to apply for declaration as dormant company under provisions of the Companies Act, 2013. Can it apply for obtaining such status in such circumstances? Explain the provisions.* *(4 marks)*

(ii) *Investa India Ltd has ₹20,000 crore as paid up share capital with ₹2,000 crores as free reserves. It has ₹1,000 crores in its securities premium account. It has made a loan to Investa LLP of ₹13,000 crore without taking any approval. Advise the company whether the approvals are required for giving loans to this LLP? If yes, explain relevant provisions of the Companies Act, 2013. What would be your answer if Investa India Ltd. is a Government Company?* *(4 marks)*

(iii) *Briefly explain the concept of 'Significant Beneficial Ownership' under section 90 of the Companies Act, 2013.* *(4 marks)*

(iv) *Can a Board meeting be held by giving five days' notice? Explain the circumstances under which a shorter notice is sufficient for such a Board Meeting.* *(4 marks)*

Answer 2(a)

According to section 182(1) of the Companies Act, 2013, the following companies are barred from making political contributions:

- Government Company
- The company which has been in existence for less than 3 financial years

KK Ltd. has been registered in the year 2017 and it has given donation in the 2019 general election. Therefore, it has violated the provisions of section 182(1) of the Companies Act, 2013 because the Company has not completed three years from its existence. Hence, this donation cannot be treated as legal donation.

Answer 2(b)

Section 152 of the Companies Act, 2013 has made Director Identification Number (DIN) a precondition for appointment as Director. Section 152 (3) of the Companies Act,

2013 provides that no person shall be appointed as a director of a company unless he has been allotted the Director Identification Number under section 154 or any other number as may be prescribed under section 153 of the Companies Act, 2013.

In instant case, Surtaal Ltd. has three Directors out of which two Directors have resigned and, in their place, two persons were named for appointment of Directors in the Board. Though, the Company have obtained their consent to act as Director, yet they did not possess DIN at the time of attending the Board Meeting.

So, they are not eligible to be appointed as Director as they have incurred disqualification under Section 164 (1)(h) of the Companies Act, 2013 by not complying with Section 152(3) of the Companies Act, 2013.

Accordingly, immediately upon the resignation of the two Directors, the Board meeting ceased to have the requisite quorum and, if they have attended the Board Meeting, resolution passed in the Meeting is not valid in absence of properly constituted Board and lack of Quorum.

Even if Surtaal Ltd. is a Private Limited Company then also to pass a resolution in the Board Meeting, it requires at least 2 Directors to be present to form a requisite Quorum. Hence the resolution passed by the Surtaal Ltd. is not valid.

Answer 2(c)

Corporate Governance aims to improve the company's image, efficiency, effectiveness and social responsibility. It encompasses in itself a range of corporate controls and accountability mechanisms designed to meet the aims of corporate stockholders. It deals with issues regarding transparency accounting integrity, composition of the board of directors, the role of non-executive directors and their accountability to shareholders, etc.

A good corporate governance report should not only be driven by what is required by law, but also by what the investors want to know. It encompasses a broad spectrum of elements, ranging from the role and powers of the board, legislation, board independence, and code of conduct to financial and operational reporting, audit committees, and risk management etc.

As per Schedule V of the SEBI (LODR) Regulations, 2015, Corporate Governance Report is a part of Annual Report. The company is required to obtain a Compliance certificate from, either the auditors or practicing company secretaries, regarding compliance of conditions of corporate governance and annex the same with the directors' report.

Answer 2(d)

Section 139 (6) of the Companies Act, 2013, lays down that if the Board fails to exercise its power to appoint the first auditor within 30 days of registration of company, the Board shall intimate such failure to the members of the company who shall within ninety days at an extraordinary general meeting appoint such auditor and such auditor shall hold office till the conclusion of the first annual general meeting. In this regard, the following procedure is to be adopted:

(1) Convene a Board meeting (as per Section 173 & Secretarial Standard (SS-1) to discuss the matter, decide the day, date, time and place of the general meeting

(extra-ordinary general meeting) to appoint first auditor which shall not be beyond 90 days of Board's information of failure to appoint first auditor and approve the draft notice of the meeting.

(2) Obtain a consent letter and certificate from the proposed auditor stating:

(a) the individual or the firm, as the case may be, is eligible for appointment and is not disqualified for appointment under the Companies Act, 2013, the Chartered Accountants Act, 1949 and the rules or regulations made thereunder;

(b) the proposed appointment is as per the term provided under the Companies Act, 2013;

(c) the proposed appointment is within the limits laid down by or under the authority of the Act;

(d) the list of proceedings against the auditor or audit firm or any partner of the audit firm pending with respect to professional matters of conduct, as disclosed in the certificate, is true and correct.

(3) Issue notice of extra-ordinary general meeting to the members of the company.

(4) Hold the extra-ordinary general meeting and pass ordinary resolution for appointing the first auditor.

(5) Immediately inform the first auditor of his appointment, forwarding therewith a certified copy of the resolution passed at the meeting.

Answer 2A(i)

According to section 455 of Companies Act, 2013 where a company is formed and registered under the Companies Act, 2013 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 for obtaining the status of a dormant company.

Here, "inactive company" means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial years, or has not filed financial statements and annual returns during the last two financial years.

As per Rule 3 of the Companies (Miscellaneous) Rules, 2014, a company shall be eligible to apply for dormant status only, if-

(i) no inspection, inquiry or investigation has been ordered or taken up or carried out against the company;

(ii) no prosecution has been initiated and pending against the company under any law;

(iii) the company is neither having any public deposits which are outstanding nor the company is in default in payment thereof or interest thereon;

(iv) the company is not having any outstanding loan, whether secured or unsecured, however if there is any outstanding unsecured loan, the company may apply

after obtaining concurrence of the lender and enclosing the same with Form MSC-1;

(v) there is no dispute in the management or ownership of the company and a certificate in this regard is enclosed with Form MSC-1;

(vi) the company does not have any outstanding statutory taxes, dues, duties etc. payable to the Central Government or any State Government or local authorities etc.;

(vii) the company has not defaulted in the payment of workmen's dues;

(viii) the securities of the company are not listed on any stock exchange within or outside India.

In the instant case, the company does not satisfy the condition of clause (viii) of Rule 3 of the Companies (Miscellaneous) Rules, 2014. Hence, it cannot apply to the Registrar of Companies for obtaining Dormant Status under the Companies Act, 2013.

Answer 2A(ii)

In pursuant to provisions of Section 186(2) of the Companies Act, 2013, no company shall directly or indirectly

- give any loan to any person or other body corporate;
- give any guarantee or provide security in connection with a loan to any other body corporate or person; and
- acquire by way of subscription, purchase or otherwise, the securities of any other body corporate

exceeding 60% of its paid-up share capital, free reserves and securities premium account or 100% of its free reserves and securities premium account, whichever is more.

In case, where the aggregate of the loans and investment so far made, the amount for which guarantee or security so far provided to or in all other bodies corporate along with the investment, loan, guarantee or security proposed to be made or given by the Board, exceed the above mentioned limits, no investment or loan shall be made or guarantee shall be given or security shall be provided unless previously authorised by a special resolution passed in a general meeting.

In the instant case, Investa India Ltd. has Rs.20,000 crore as paid up share capital with Rs.2000 crore as free reserves. It has Rs.1000 crore in its securities premium account. It has made a loan to Investa LLP of Rs.13000 crore.

Hence, approval of members in General Meeting is not required as per Section 186(3) of the Companies Act, 2013 as loan given is less than 60% of paid up share capital, free reserve and securities premium account, however the company must take consent of all the directors present at the board meeting before giving loan as per Section 186(5) of the Companies Act, 2013.

In case Investa India Ltd. is a Government Company Section 186(2) of the Companies Act, 2013 shall not apply

- if engaged in defence production or

- it is a Government company other than the listed company, in case such company obtains approval of the Ministry or Department of Central Government which is administratively in charge of the company or State Government, as the case may be.

Answer 2A(iii)

Section 90(1) of the Companies Act, 2013 states that every individual, who acting alone or together, or through one or more persons or trust, including a trust and persons resident outside India, holds beneficial interests, of not less than 25% or such other percentage as may be prescribed, in shares of a company or the right to exercise, or the actual exercising of significant influence or control as defined in clause (27) of section 2 of the Companies Act, 2013 over the company is referred to as "significant beneficial owner" and shall make a declaration to the company, specifying the nature of his interest and other particulars, in such manner and within such period of acquisition of the beneficial interest or rights and any change thereof, as may be prescribed.

As per the definition provided in Section 90(1) of the Companies Act, 2013 the Central Government is empowered to prescribe other threshold limit for the determination of the Significant Beneficial Owner. Accordingly, Rule 2(h) of the Companies (Significant Beneficial Owners) Rules, 2018 as amended by the Companies (Significant Beneficial Owners) Amendment Rules, 2019, provides the following definition –

"Significant beneficial owner" in relation to a reporting company means an individual referred to in Section 90(1) of the Companies Act, 2013, who acting alone or together, or through one or more persons or trust, possesses one or more of the following rights or entitlements in such reporting company, namely:

(i) holds indirectly, or together with any direct holdings, not less than 10% of the shares;

(ii) holds indirectly, or together with any direct holdings, not less than 10% of the voting rights in the shares;

(iii) has right to receive or participate in not less than 10% of the total distributable dividend, or any other distribution, in a financial year through indirect holdings alone, or together with any direct holdings;

(iv) has right to exercise, or actually exercises, significant influence or control, in any manner other than through direct holdings alone.

If an individual does not hold any right or entitlement indirectly under sub-clauses (i), (ii) or (iii) as mentioned above, he shall not be considered to be a significant beneficial owner.

Answer 2A(iv)

As per Section 173(3) of the Companies Act, 2013, a meeting of the Board requires not less than 7 days' notice in writing to every director at his address registered with the company and such notice shall be sent by hand delivery or by post or by electronic means.

However, in case of urgent business transactions, a shorter notice may be given for a Board meeting, subject to the condition that at least one independent director, if any, shall be present at the meeting.

In case of absence of independent directors from such a meeting of the Board, convened at a shorter notice, decisions taken at such a meeting shall be circulated to all the directors and shall be final only on ratification thereof by at least one independent director, if any.

Further, as per SS-1, in case the company does not have an Independent Director, the decisions shall be final only on ratification thereof by a majority of the Directors of the company, unless such decisions were approved at the Meeting itself by a majority of Directors of the company.

Accordingly, subject to above referred compliances, a Company may convene a Board meeting with a 5 days' notice.

Attempt all parts of either Q. No. 3 or Q. No. 3A

Question 3

(a) Once the Cost Auditor is appointed, what are the regulatory and other compliances a company needs to carry out ? (4 marks)

(b) The Board of Directors of Universe Ltd wants to take following two decisions in their Board Meeting:

(i) To give on lease an undertaking in which it has an investment share of 32% of its net worth as per last financial year.

(ii) To remit, or give time for repayment of, any debt due from a director.

Advise the Board about its power to take such decisions and the procedure to be adopted. (4 marks)

(c) SBB Ltd wants to shift its Registered Office from Indore, Madhya Pradesh to Coimbatore, Tamil Nadu. Draft a Board resolution for change of Registered Office from one state to another. (4 marks)

(d) PQR Ltd. wants to remove Nayan, Company Secretary of the Company because he has cheated to the Company for ₹50.00 lakhs during the course of his employment of last three years. Advise the Company for removing the Company Secretary from his employment. (4 marks)

OR (Alternate question to Q. No. 3)

Question 3A

Write short notes on the following :

(i) Corporate Guarantee by a Company to another Company

(ii) E-Form-DPT-3

(iii) Treasury Shares

(iv) Dissolution of Society. (4 marks each)

Answer 3(a)

Every company required to get cost audit conducted under Section 148 of the Companies Act, 2013 has to carry out various regulatory and other compliances after appointment of Cost Auditor at the Board Meeting such as:

- Rule 6(2) of the Companies (Cost Records and Audit) Rules, 2014 provides that the company shall inform the cost auditor concerned of his/its appointment.

- According to Rule 14 of the Companies (Audit and Auditors) Rules, 2014, the audit committee, if constituted by the company recommends to the Board a suitable remuneration to be paid to the cost auditor which shall be approved and considered by the Board of Directors. In case of other companies which are not required to constitute an audit committee, the Board shall consider and approve the remuneration of the Cost Auditor. Subsequently, the approved remuneration shall be ratified by the shareholders of the company.
- Further, a company is required to file a notice of such appointment with the Central Government in **Form CRA-2**, along with the specified fees within a period of 30 days of Board Meeting in which such appointment is made or within a period of 180 days of the commencement of the financial year, whichever is earlier.
- Within a period of 30 days from the date of receipt of a copy of the cost audit report in **Form CRA-3**, the company is required to furnish the same to the Central Government in **Form CRA-4** along with specified fees. Such form shall contain full information and explanation on every reservation or qualification contained in the cost audit report.
- The company including all units and branches thereof is required to maintain cost records in **Form CRA-1**.

Answer 3(b)

According to section 180(1) (a) and 180(1) (d) of the Companies Act, 2013, the Board of Directors of a company can exercise the following powers only with the consent of the company by a special resolution, namely:—

(a) to sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking, of the whole or substantially the whole of any of such undertakings.

For the purpose of this clause:

"undertaking" shall mean an undertaking in which the investment of the company exceeds 20% of its net worth as per the audited balance sheet of the preceding financial year or an undertaking which generates 20% of the total income of the company during the previous financial year.

(d) to remit, or give time for the repayment of, any debt due from a director.

Base on the above provisions of the Companies Act, 2013, the Board of Directors of Universe Limited can give on lease an undertaking in which it has an investment share of 32% of its net worth as per last financial year and remit, or give time for the repayment of, any debt due from a director only with the consent of the company by a special resolution.

Hence, Board of Directors of Universe Ltd does not have power to take above mentioned decision in Board Meeting, except without the members' consent by way of a special resolution.

The procedure for taking such an action is as follows:

1) Convene a Board meeting to discuss the matter and decide the day, date, time and place of the General Meeting and approve the draft notice of General Meeting

along with explanatory statement annexed to the notice as per requirement of the Section 102 of the Companies Act, 2013;

2) To authorize the Director or Company Secretary to sign and issue notice of the General Meeting and to do such acts, deeds and things as may be necessary to give effect to the Board's decision;

3) Issue notice of General Meeting to the members of the company;

4) Hold the General Meeting and pass special resolution for obtaining consent for giving on lease of an undertaking in which it has an investment share of 32% of its net worth as per last financial year and to remit, or give time for the repayment of, any debt due from a director.

5) Special resolution passed by the company consenting to the transaction regarding lease of an undertaking may stipulate such conditions as may be specified in such resolution, including conditions regarding the use, disposal or investment of the sale proceeds which may result from the transactions.

6) In terms of Section 117(3) (a), the Special Resolution passed by the company has to be filed with Registrar in Form MGT-14 with the specified fees.

Answer 3(c)

The Board Resolution for change of registered office from one State to another

"RESOLVED THAT pursuant to the provisions of Section 12 of the Companies Act, 2013 and other applicable provisions, if any, and subject to the approval of members of the Company by a special resolution at a general meeting and confirmation of the Regional Director or other approvals and compliances, as may be necessary, under the Companies Act, 2013 or the Articles of Association of the Company, the consent of the Board of Directors of the Company be and is hereby accorded for the purpose of shifting the registered office of the Company from its present location at Indore, Madhya Pradesh to Coimbatore, Tamil Nadu; "

"RESOLVED FURTHER THAT, pursuant to Section 13 of Companies Act 2013 and Rules made there under, Clause…… of Memorandum of Association of the Company, be and is hereby altered subject to approval of members in General Meeting. "

"RESOLVED FURTHER THAT a special resolution according approval to the proposed alterations by the members of the Company will be proposed at the ..... annual general meeting/extra-ordinary general meeting of the company to be held on .... at the …….. of the company and the Company Secretary be and is hereby authorised to issue notice of the said meeting together with related explanatory statement, in accordance with the draft placed before this meeting, to the members of the company in accordance with the provisions of Companies Act, 2013 and the articles of association of the company;

"RESOLVED FURTHER THAT .... Advocate/Company Secretary in whole-time practice/practising Chartered Accountant/practising Cost Accountant be and is hereby authorised to appear and represent the Company before the Regional Director, in the matter of the petition to be filed for their confirmation to the proposed alteration of the Memorandum of Association of the Company, so as to the change of the place of

the registered office from one State to another and are also authorised to make such statements, furnish such information and do such acts, deeds and things as may be necessary in relation to the said petition; "

"RESOLVED FURTHER THAT Mr. ..... director, Mr. ....., director, and Mr……., secretary, be and are hereby authorised jointly and severally to sign the said petition/application, affidavits and such other documents as may be necessary in relation to the said petition.

Answer 3(d)

A company secretary can be removed or dismissed like any other employees of the organization. Since he is appointed by Board, the Board of directors of a company has absolute discretion to remove a company secretary or to terminate his services at any time for any reason or without any reason. However, principles of natural justice like show cause notice, hearing, reasoned order etc. must be followed.

A Company Secretary can be removed in accordance with the terms of appointment and the Board can record the same. The procedure for removal of Company Secretary is:

- Convene a Board meeting after giving notice to all the directors of the company as per section 173 of the Companies Act, 2013, place the matter of removal of the Company Secretary and pass a resolution to the effect. The resolution shall state the effective date of termination of the Company Secretary.
- The Company shall thereafter serve a notice of termination on the Company Secretary. The period of notice shall be governed by the employment letter or in its absence the termination policy of the Company.
- The Company Secretary shall cease to be in office from the date of expiry of notice.
- File **E-Form DIR-12** within 30 days with the Registrar of Companies together with requisite filing fees along with evidence of Cessation.
- Inform the stock exchange, if the company is listed.
- The Company shall also intimate the Institute of Company Secretaries of India regarding the professional misconduct of the Company Secretary.
- Make entries in the Register maintained for recording the particulars of Company Secretaries under section 170 of the Companies Act, 2013.
- Issue a general public notice, if it is so warranted, according to size and nature of the company.

Thus, PQR Ltd. has to follow above procedures.

Answer 3A(i)

Corporate Guarantee by a Company to another Company

Section 186(2) of the Companies Act, 2013 provides that, no company shall directly or indirectly give any guarantee or provide security in connection with a loan to any other body corporate or person exceeding 60% per cent. of its paid-up share capital, free

reserves and securities premium account or 100% of its free reserves and securities premium account, whichever is more.

Where the aggregate of the amount for which guarantee or security so far provided to or in all other bodies corporate along with guarantee or security proposed to be made or given by the Board, exceed the limits specified above, no guarantee or security shall be provided unless previously authorised by a special resolution passed in a general meeting.

However, where the inter-corporate guarantee is given or where a security has been provided by a company to its wholly owned subsidiary company or a joint venture company, the requirement of Section 186(2) of the Companies Act, 2013 shall not apply.

The company shall disclose to the members in the financial statement the full particulars of the guarantee given or security provided and the purpose for which the guarantee or security is proposed to be utilised by the recipient of the guarantee or security.

No guarantee or security can be given by the company unless the resolution sanctioning it is passed at a meeting of the Board with the consent of all the directors present at the meeting and the prior approval of the public financial institution concerned is obtained, where any term loan is subsisting.

Answer 3A(ii)

E- Form DPT - 3

Pursuant to section 73 of Companies Act, 2013 read with rule 16 of the Companies (Acceptance of Deposits) Rules, 2014, every company to which the Companies (Acceptance of Deposit) Rules, 2014 applies shall on or before 30th June of every year file a Return with the Registrar of Companies in **Form DPT-3** along with the specified fees and furnish the information contained therein as on 31st March of that year duly audited by the auditor of the company

Further, Form DPT-3 shall be used for filing return of deposit or particulars of transaction not considered as deposit or both by every company other than Government Company.

Attachments to DPT-3

1. Auditor's certificate- – Mandatory if purpose 'Return of Deposit' or 'Return of Deposit and Particulars of transactions by a company not considered as deposit' is selected.
2. Copy of trust deed - Mandatory if company has trust deed and details of same are mentioned in the form.
3. Copy of instrument creating charge - Mandatory if company has trust deed and details of same are mentioned in the form.
4. List of depositors- List of deposits matured, cheques issued but not yet cleared to be shown separately – Mandatory if company has balance of deposits outstanding at the end of the year.
5. Details of liquid assets.
6. Optional attachment, if any

Answer 3A(iii)

Treasury Shares

Treasury shares in India are used to be created in two scenarios by Mergers and Amalgamations of companies or by Buy-back of securities of the company.

However, Section 233(10) of the Companies Act, 2013 prohibits the creation of treasury shares in Merger and Amalgamation, stating that a transferee company shall not on merger or amalgamation, hold any shares in its own name or in the name of any trust either on its behalf or on behalf of any of its subsidiary or associate company and all such shares shall be cancelled or extinguished on the merger or amalgamation of the company.

It may also be noted that, Regulation 11 of the SEBI (Buy-Back of Securities) Regulations, 2018, states that the company shall ensure that all the securities bought-back are extinguished within seven days of expiry of buy-back period.

Alternate Answer

UK Companies Act, 2006

Under the UK Companies Act, 2006, Treasury Shares are the company's own issued shares that it has repurchased in accordance with Chapter 4 of the said Act and the purchase is made out of distributable profits. As per Section 724 of the UK Companies Act, 2006, where shares are held by the company, the name of the company must be entered in its register of members (or, as the case may be, the company's name must be delivered to the registrar under Chapter 2A of Part 8 of the UK Companies Act, 2006) as the member holding the shares.

According to Section 726 of the UK Companies Act, 2006, the company must not exercise any right (to attend or vote at meetings) in respect of the treasury shares, and any purported exercise of such a right shall be void. Also, no dividend may be paid, and no other distribution (whether in cash or otherwise) of the company's assets (including any distribution of assets to members on a winding up) may be made to the company, in respect of the treasury shares.

Section 727 of the UK Companies Act, 2006, states that where a company hold shares as a Treasury Shares, the company may at any time—

(a) sell the shares (or any of them) for a cash consideration, or

(b) transfer the shares (or any of them) for the purposes of or pursuant to an employees' share scheme.

Further, as per Section 729 of the Act, where shares are held as treasury shares, the company may at any time cancel the shares (or any of them). If company cancels shares held as treasury shares, the amount of the company's share capital is reduced accordingly by the nominal amount of the shares cancelled. The directors may take any steps required to enable the company to cancel its shares under this section without complying with the provisions of Chapter 10 of Part 17 of the UK Companies Act, 2006 (i.e. reduction of share capital).

Alternate Answer

Singapore Companies Act, 1967

Section 4 of the Singapore Companies Act, 1967, defines the "Treasury Shares" as a share which —

a) was (or is treated as having been) purchased by a company in circumstances in which Section 76H of the Singapore Companies Act, 1967 applies; and

b) has been held by the company continuously since the treasury share was so purchased

As per Section 76H of the Singapore Companies Act, 1967, pertaining to Treasury Shares, where ordinary shares or stocks are purchased or otherwise acquired by a company in accordance with the provisions of the Section 76B to 76G of the Singapore Act, 1967, the company may —

(a) hold the shares or stocks (or any of them); or

(b) deal with any of them, at any time, in accordance with section 76K, as provided hereunder:

Where shares are held as treasury shares, the company may at any time –

i) sell the shares (or any of them) for cash;

ii) transfer the shares (or any of them) for the purposes of or pursuant to any share scheme, whether for employees, directors or other persons;

iii) transfer the shares (or any of them) as consideration for the acquisition of shares in or assets of another company or assets of a person;

iv) cancel the shares (or any of them); or

v) sell, transfer or otherwise use the treasury shares for such other purposes as the Minister may by order prescribe.

Further, as per Section 76(I), where a company has shares of only one class, the aggregate number of shares held as Treasury Shares shall not at any time exceed 10% of the total number of shares of the company at that time. Where the share capital of a company is divided into shares of different classes, the aggregate number of the shares of any class held as treasury shares shall not at any time exceed 10% of the total number of the shares in that class at that time.

Answer 3A(iv)

Dissolution of Society

Under Section 13 of the Societies Registration Act, 1860, a society can be dissolved. Dissolution of a society becomes necessary where the objects for which it is formed, has been fulfilled or where the purposes for which it is formed, have become irrelevant, invalid or inoperative or by passing of a resolution by 3/5th majority of the members present at a meeting to dissolve the society for utilisation of its assets for some other better use. A society may be dissolved forthwith or within the agreed time.

The following steps are to be taken for dissolution of society:

1. Decision of the governing body;
2. Convene a special general meeting of the members by giving a requisite notice for consideration and passing resolution by 3/5th majority of the members present thereat;
3. Decision as to dissolve it forthwith or at a later time agreed upon by them.
4. Decision for the actions to be taken for disposal of properties and settlement of claims and liabilities as per the rules and regulations of the society, and
5. Delegate authority to the person(s) of the governing body to comply with the decisions accordingly

Where any Government is a member of the society or has contributed the funds to the society or is otherwise interested therein, the society shall have to obtain prior consent of such Government for the purpose.

Where any dispute arises on dissolution of a society relating to adjustment of its affairs, it should be referred to the principal Court of the original civil jurisdiction of the District where the chief building of the society is situated.

Dissolution of a society results in cessation of its activities. Its liabilities are to be settled suitably and its surplus assets are to be given to another society or the Government in terms of its rules and regulations. If the rules do not provide for the same, the governing body of the society shall take appropriate steps with requisite majority vote or as directed by the Registrar or the Court. But in no circumstances, the surplus assets of the dissolved society can be paid or distributed amongst its members or any of them.

Question 4

(a) Vinod, Chairperson of the Monika Ltd. is going to USA for official work and instructed to the Company Secretary for signing of Board's Report in his absence from other directors of the Company. Whether the other directors can sign the Board's Report? If yes, explain the provisions for signing of Board's Report in the absence of Chairperson in the Company. What would be your answer if this company is One Person Company.

(b) LMN Ltd. having paid up share capital of ₹35 crores proposes to enter into a contract with Amesh, who is a brother of Anil Kumar for procurement of semi-finished goods for an amount of ₹7 crore during the financial year. Discuss the compliance requirements in respect of the above procurement contract.

(c) XYZ & Co., a proprietary firm of Amit, a Chartered Accountant in practice, has been appointed as an Independent auditor of ABC Ltd. Subsequently, it came to the light that Smita, sister of Amit is Chief Financial Officer, in that company. Comment on the appointment of the Independent Auditor?

(d) "Every Company shall place a copy of its annual return on the website of the Company." Comment. (4 marks each)

Answer 4(a)

As per section 134(6) of the Companies Act, 2013, the Board's report and any annexures thereto shall be signed by its chairperson of the company, if he is authorised

by the Board and where he is not so authorised, shall be signed by at least two directors, one of whom shall be a managing director of the company, or by the director, where there is one director.

Hence, in the instant case, in the absence of the Chairperson of the Monika Ltd. the other Directors of the company can sign the Board Report, in accordance with the above provisions.

If the Monika Ltd. is a One Person Company (OPC) having only one director, then such director shall sign the Board Report.

Answer 4(b)

Under Section 188 of the Companies Act, 2013 read with Rule 15 of the Companies (Meetings of the Board & its Powers) Rules, 2014, in addition to the approval of Board of Directors, prior approval of members by means of a resolution would also be required for sale, purchase or supply of any goods or material, directly or through appointment of agent, amounting to 10% or more of the turnover of the company.

The contract referred to in instant case, is a contract for procurement of semi-finished goods. Further, if Amnesh is a related party to the Company, then this contract shall not be entered into except with the consent of the Board of Directors given by a resolution at a meeting of the Board.

However, in the event that the total value of the Contract with a Related Party is equal to 10% or more of the Turnover of the company, then, in addition to the approval of Board of Directors, prior approval of members by means of a resolution passed at a general meeting would also be required before entering into such a contract. The details of contract or arrangement entered into shall also be referred to in the Board's report to the shareholders along with the justification for entering into such contract.

Alternate Answer

The contract referred to in the instant case, is a contract for procurement of semi-finished goods and from the given fact it can be construed that there is no related party transaction under Section 188 of the Companies Act, 2013. Hence, there is no compliance requirement under the Companies Act, 2013, except recording of the transactions in the books of account.

Answer 4(c)

According to section 141 (3) (f) of the Companies Act, 2013, if any relative of the auditor is a director or is in the employment of the company, as a director or as a key-managerial-personnel then such Auditor shall not be eligible to be appointed or continue as the auditor of the Company.

Smita, the CFO of the Company is the relative of Amit who is the Proprietor of the Auditor Firm XYZ & Co., hence such Auditor cannot continue as an Independent Auditors of the Company and therefore shall vacate their office as such in terms of Sec 141(4) of the Companies Act, 2013 and such vacancy shall be deemed to be a casual vacancy in the office of Auditor.

Answer 4(d)

The Companies (Amendment) Act, 2017 has amended Section 92(3) of the Companies Act, 2013. As per the amended provision every company shall place a copy of the annual return on the website of the Company, if any and the web link of such annual return is required to be disclosed in the Board's Report in terms of section 134 (3) (a) of the Companies Act, 2013. This provision is yet to be notified by the Central Government.

Alternate Answer

The Companies (Amendment) Act, 2017 has amended Section 92(3) of the Companies Act, 2013. As per the amended provision every company shall place a copy of the annual return on the website of the Company, if any and the web link of such annual return is required to be disclosed in the Board's Report in terms of section 134 (3) (a) of the Companies Act, 2013.This provision has been notified w.e.f. 28th August, 2020.

Question 5

(a) Rosy is a shareholder in TPT Pvt. Ltd. One day, she received a notice that her name has been removed as a shareholder because her shares have been transferred to another person. What is her legal position in the company and what course of action she should adopt ? (4 marks)

(b) You are a company secretary in SOP Ltd. The company has borrowed secured loans through issue of debentures. The debenture trustee has been appointed for it by the company. The debenture trustee is seeking your assistance for the preparation of debenture trust deed. Explain the provisions of debenture trust deed. (4 marks)

(c) ''Main sources of Board's powers include the Companies Act, Memorandum and articles and resolutions of members.'' Do you agree with the statement? Explain. (4 marks)

(d) Any company may file an application with the Registrar of Companies (ROC) for removal of its names from the Register of Companies. However, there are certain companies whose names cannot be removed from the register by the ROC. Do you agree with the statement? Justify your answer with reasons. (4 marks)

Answer 5(a)

In terms of Sec 56 of the Companies Act, 2013 a company shall not register a transfer of securities of the company, other than the transfer between persons both of whose names are entered as holders of beneficial interest in the records of a depository, unless a proper instrument of transfer, in prescribed **Form SH-4**, duly stamped, dated and executed by or on behalf of the transferor and the transferee and specifying the name, address and occupation, if any, of the transferee has been delivered to the company by the transferor or the transferee within a period of 60 days from the date of execution, along with the certificate relating to the securities, or if no such certificate is in existence, along with the letter of allotment of securities.

Transfer of shares without consent of holder of shares and without prior sanction of Board of Directors as required under articles of association of a private company concerned

could not be held to be valid. [*John Tinson Co. (P) Ltd.* v. *Surjeet Malhan (1997) 88 Comp Cas 750 (SC)*] –

Accordingly, in the absence of a sufficient cause, Rosy's name ought not to have been removed from the Register of members of the Company and therefore in terms of Sec 59(1) of the Companies Act, 2013 Rosy may prefer an appeal before the Tribunal, or to a competent court outside India, specified by the Central Government by notification, in respect of foreign members or debenture holders residing outside India, for rectification of the Register of Members of TPT Pvt. Ltd.

Answer 5(b)

Section 71 of the Companies Act, 2013 empowers the Central Government to prescribe the procedure, for securing the issue of debentures, the form of debenture trust deed, the procedure for the debenture-holders to inspect the trust deed and to obtain copies thereof, quantum of debenture redemption reserve required to be created and such other matters.

Rule 18(5) of the Companies (Share Capital and Debentures) Rules, 2014 state that, a trust deed in Form No. SH-12 or as near thereto as possible shall be executed by the Company issuing debentures in favour of the debenture trustees. The Trust deed shall be executed within 3 months of closure of the issue or offer.

The debenture trust deed shall, inter alia, contain the following:

- Description of Debenture Issue
- Details of Charge Created (in case of Secured Debentures)
- Particulars of the Appointment of Debenture Trustee(s)
- Events of Default
- Obligations of Company
- Miscellaneous

A trust deed for securing any issue of debentures shall be open for inspection to any member or debenture holder of the company, in the same manner, to the same extent and on the payment of the same fees, as if it were the register of members of the company. A copy of the trust deed shall be forwarded to any member or debenture holder of the company, at his request, within 7 days of the making thereof, on payment of fee.

Answer 5(c)

The statement that the main sources of Directors powers include the Companies Act, 2013, the Memorandum and Articles of Association of the company and resolutions passed by the Members is correct subject to certain reasonable conditions.

There are two limitations specified in the Companies Act, 2013, namely:

- Section 179 of the Companies Act, 2013 empowers the Board of Directors of the company to exercise all such powers, and to do all such acts and things, as the company is authorised to do except where it is specifically mentioned in the Companies Act, 2013 or in the Memorandum and Articles of Association of the

company or other regulations made by the company, that the power shall be exercised at a general meeting by the shareholders; and

- Anything done by the Board of Directors of the Company should be in accordance with the provisions of the Companies Act, 2013, other applicable laws or statues, or Memorandum and Articles of Association of the company.

Thus, the Board is the custodian of the interests of the company and its stakeholders. When powers are vested in the Board of Directors by the Articles of Association of a company, the shareholders cannot interfere with them. If the shareholders are dissatisfied with what the directors do or the manner in which they do it, then, their remedy is to remove the Directors from their respective office in the manner provided by the Companies Act, 2013 or the Articles of Association of the Company. But so long as the Board of Directors exists and particular powers are vested in it by the articles, they are entitled to exercise those powers without interference by the shareholders and it is irrelevant whether the shareholders approve of what the directors have done or not. [*Jagdishi Prasad* vs. *Paras Ram (1942)*].

Answer 5(d)

Removal of name from Register of Companies by Registrar

Section 248 of the Companies Act, 2013 read with Rule 3 & 4 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 stipulates that the following categories of companies shall not be removed from the register of companies such as:

(a) listed companies;
(b) companies that have been delisted due to non-compliance of listing regulations or listing agreement or any other statutory laws;
(c) vanishing companies;
(d) companies where inspection or investigation is ordered and being carried out or actions on such order is still pending or were completed but prosecutions arising out of such inspection or investigation are pending in the Court;
(e) companies where notices under section 234 of the erstwhile Companies Act, 1956 or section 206 or section 207 of the Companies Act, 2013 have been issued by the Registrar or Inspector and reply thereto is pending or report under section 208 of the Companies Act, 2013 has not been submitted or follow up of instructions on report is pending or where any prosecution arising out of such inquiry or scrutiny, if any, is pending with the Court;
(f) companies against which any prosecution for an offence is pending in any court;
(g) companies whose application for compounding is pending before the competent authority for compounding the offences committed by the company or any of its officers in default;
(h) companies which have accepted public deposits which are either outstanding or default in repayment of the same;
(i) companies having charges which are pending for satisfaction; and
(j) Companies registered under section 25 of the erstwhile Companies Act, 1956 or section 8 of the Companies Act, 2013.

Question 6

(a) Draft a Board Resolution for availing of term loan and working capital facilities sanctioned by the ABC Bank to the Company. (4 marks)

(b) You are a qualified Company Secretary and have been recently appointed as Compliance Officer of a public listed company. Describe your responsibilities as a Compliance Officer. (4 marks)

(c) Solid Ltd., wants to declare final dividend. The company did not earn profits in last two years. Can the final dividend be declared and paid in such a situation? Explain the provisions in this regard. (4 marks)

(d) (i) On receipt of the notice and agenda notes from ABC Ltd., Harpreet , Director has requested for participation through video conferencing on the scheduled date of the meeting. As a Company Secretary, what should be your advice to the Chairperson of the Board?

(ii) Also whether the Chairperson can attend the Board Meeting through video conferencing?

Advise the Company in the matter. (4 marks)

Answer 6(a)

"RESOLVED THAT pursuant to Section 179(3)(d) and other applicable provisions of the Companies Act, 2013,if any and rules made thereunder read with the Articles of Association of the company, the consent of the Board of Directors of the Company be and is hereby accorded to the Company to avail the credit facilities by way of (i) term loan to the extent of Rs…… and (ii) working capital facilities such as Cash Credit to the extent of Rs……. aggregating to Rs……..from ABC Bank, at its branch situated at……..

"RESOLVED FURTHER THAT the terms and conditions as are stipulated in the sanction letter dated…… of the said Bank, a copy of which has been tabled at the meeting, be and the same are hereby accepted in total and that Shri …… (Director) and Shri…….(Director) of the Company be and are severally and jointly authorized to convey acceptance of such terms of sanction to the said Bank and also to sign and execute all relevant legal documents including DP Note, Hypothecation Deed and such other documents as are required to be executed by the Company in favour of the said Bank and that the common seal of the Company if required to be affixed on such document wherever required by the Bank in the presence of any one of the above named Directors of the Company."

"**RESOLVED FURTHER THAT** the above-named Directors of the Company be and are also authorized to file charge in E-Form CHG-1 along with specified fees with the concerned Registrar of Companies in accordance to the provisions of the Companies Act, 2013".

"**RESOLVED FURTHER THAT** the above-named Directors of the Company be and are also authorized to operate the Bank Account(s) of the Company with the said Bank as are already authorized earlier to continue to avail of the said credit facilities sanctioned to the Company."

Answer 6(b)

Regulation 6 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 prescribes the responsibilities of a Compliance Officer of a listed entity as indicated hereinafter:

The compliance officer of the listed entity shall be responsible for –

(a) ensuring conformity with the regulatory provisions applicable to the listed entity in letter and spirit.

(b) co-ordination with and reporting to the Board, recognized stock exchange(s) and depositories with respect to compliance with rules, regulations and other directives of these authorities in manner as specified from time to time.

(c) ensuring that the correct procedures have been followed that would result in the correctness, authenticity and comprehensiveness of the information, statements and reports filed by the listed entity under these regulations.

(d) monitoring email address of grievance redressal division as designated by the listed entity for the purpose of registering complaints by investors:

However, the requirements of this regulation shall not be applicable in the case of units issued by mutual funds which are listed on recognised stock exchange(s) but shall be governed by the provisions of the Securities and Exchange Board of India (Mutual Funds) Regulations, 1996.

Answer 6(c)

Rule 3 of the Companies (Declaration and Payment of Dividend) Rules, 2014 make rules for declaration of dividend out of free reserves in the event of adequacy or absence of profits in any year, subject to the fulfilment of the following conditions, namely:

(1) The rate of dividend declared shall not exceed the average of the rates at which dividend was declared by it in the three years immediately preceding that year. However, this provision shall not apply to a company, which has not declared any dividend in each of the three preceding financial year.

(2) The total amount to be drawn from such accumulated profits shall not exceed one-tenth of the sum of its paid-up share capital and free reserves as appearing in the latest audited financial statement.

(3) The amount so drawn shall first be utilised to set off the losses incurred in the financial year in which dividend is declared before any dividend in respect of equity shares is declared.

(4) The balance of reserves after such withdrawal shall not fall below 15% of its paid up share capital as appearing in the latest audited financial statement.

Accordingly, Solid Ltd may declare and pay final dividend out of the free reserve, in accordance with the above referred provisions.

Answer 6(d)

(i) Yes, it is mandatory under Section 173(2) of the Companies Act, 2013 for company to allow participation of directors in a meeting through video

conferencing, unless the Companies Act, 2013 or any other law specifically prohibits such participation through Electronic Mode in respect of any item of business.

Accordingly, subject to the prior intimation to that effect received from the director sufficiently in advance so that company is able to make suitable arrangements in this behalf, the Chairman shall make arrangements to allow participation of the said Director in the meeting through video conferencing in accordance with the said Rule 3 of the Companies (Meetings of Board and its Powers) Rules, 2014. However, if the request is received too late so as to allow reasonable time to make the necessary arrangements, the Chairman is not bound to provide the video conferencing facility to the Director.

(ii) Yes, it is permitted under Section 173(2) of the Companies Act, 2013 read with Rules made thereunder, for even the Chairman of the meeting to join the meeting through video conferencing.

However, in case the Chairman of the Board Meeting is participating through Electronic Mode, he should, while transacting any restricted items of business, vacate the Chair and entrust the conduct of the proceedings in respect of such items to any other Non-interested Director attending the Meeting physically and should not participate in the meeting in respect of such items.

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SECRETARIAL AUDIT, COMPLIANCE MANAGEMENT AND DUE DILIGENCE

Time allowed : 3 hours *Maximum marks : 100*

NOTE: *Answer **ALL** Questions.*

PART A

(Attempt all parts of either Q. No. 1 or Q. No. 1A)

Question 1

(a) A company has a share capital of 5,00,000 equity shares of ₹10 each, ₹6 paid up per share. It has a balance in the Reserve Fund Account amounting to ₹ 50,00,000.

The company has decided to pay bonus to shareholders. Answer the following :

(i) As a company secretary suggest the Board of directors, the check list for issuing the bonus issue.

(ii) Can the company issue bonus shares on the basis of information given above ? *(4+1=5 marks)*

(b) Y, while conducting secretarial audit of ABC Ltd. has found that one of the employees of the company is diverting the funds of the company to buy goods for this own benefit thereby committing the fraud amounting to ₹80 lakh.

What course of action Y as a company secretary should take in this regard ? *(5 marks)*

(c) XYZ Ltd. a company wants to shift its registered office from Chennai, Tamil Nadu (ROC, Chennai) to Coimbatore, Tamil Nadu (ROC, Coimbatore) since the company is facing operational difficulties due to the current location of the registered office.

As a company secretary, advise the Board of directors about the requirements the company need to fulfil as per the Companies (Incorporation) Rules, 2014. *(5 marks)*

(d) Benjamin, a foreign investor wants to make investment in India. He is not familiar with the Foreign Direct Investment (FDI) Scheme of India. As a company secretary, advise Benjamin, whether he can invest in following activities or not :

(i) For constructing farm houses in Mumbai.

(ii) For construction of residential township in Noida (UP).

(iii) He wants you to prepare the check list if he wants to make investment in publishing of newspaper and periodicals dealing with news and current affairs.

Prepare it. *(2+1+2=5 marks)*

(e) (i) A company secretary qualifies its report because a company is not maintaining register of proxies. Is he right in doing so?

(ii) What will he check in the Register of proxies as a company secretary? *(2+3=5 marks)*

OR (Alternate Question to Q. No. 1)

Question No. 1A

(i) Following data was presented by a company ZZ Ltd. covered for the provisions of the Corporate Social Responsibility (CSR) under section 135 of the Company Act, 2013: *(₹ in Lakh)*

Financial Year	*Profit before tax*	*Income Tax under Income Tax Act 1961*	*Net Profit after Tax*
2015-16	*240*	*75*	*165*
2016-17	*400*	*100*	*300*
2017-18	*650*	*250*	*400*
2018-19	*750*	*160*	*590*

Calculate the total expenses which ZZ Ltd. is required to spend on CSR activities citing the relevant provisions as per the Companies Act, 2013 for the financial year 2018-19. *(5 marks)*

(ii) Sen holds 8% shares in Z Ltd. B Ltd. holds 5% shares in Z Ltd. Sen holds 60% shares in B Ltd. Whether Sen will be considered as significant beneficiary owner under the Companies Act, 2013 ? *(5 marks)*

(iii) ABC Technologies Pvt Ltd. is a private company with authorised capital of ₹ 19,00,00,000 divided into 1,90,00,000 of equity shares of ₹10 each. The issued, subscribed and paid up share capital of the company is ₹8,00,00,000 divided into 80,00,000 of equity shares of ₹10 each. The company could not appoint its full time Company Secretary as required under the provisions of the Companies Act, 2013 although the company has been making regular efforts to identify and appoint suitable candidate for the position. However, no professional Company Secretary was interested in joining the company, since it was a private limited company, the scope of work available was minimal which did not create any interest for potential Company Secretaries to work in the company.

Will it amount to non-compliance under provisions of the Companies Act, 2013 ? If so, what are the consequences, the company will face under the Companies Act, 2013 ? *(5 marks)*

(iv) Y Ltd. was incorporated in 2012. Earlier, you as a Company Secretary has informed the Board of directors that there is non-compliance in filing ACTIVE form. The Board is now seeking your advice regarding consequences on the company of non-filing it.

Give your advise. *(5 marks)*

(v) Lira India Pvt. Ltd. is a subsidiary of Lira Inc. USA. During the financial year 2018-19, the holding company on behalf of its subsidiary i.e. Lira India Pvt Ltd. had paid directly to the Income tax department through online banking a sum of ₹1.5 crore towards a tax demand. Lira India Pvt Ltd. in its financials for the year ended on 31st March 2019 stated that amount due to holding company as ₹1.5 crore under current liabilities. Answer the following :

(a) As a company secretary, comment how such financial assistance received by Lira India Pvt Ltd. will be viewed by Reserve Bank of India (RBI) authorities under Foreign Exchange Management Act (FEMA), 1999.

(b) Indicate a check list for issue of Foreign Currency Convertible Bonds (FCCBS). *(3+2=5 marks)*

Answer 1(a)

(i) Checklist for Bonus issue (section 63)

1. Check whether it is authorised by its articles;
2. Whether it has, on the recommendation of the Board, been authorised in the general meeting of the company;
3. Whether the company has defaulted in payment of interest or principal in respect of fixed deposits or debt securities issued by it;
4. Whether it has defaulted in respect of the payment of statutory dues of the employees, such as, contribution to provident fund, gratuity and bonus;
5. Whether the partly paid-up shares, if any outstanding on the date of allotment, are made fully paidup;
6. Whether the bonus is declared only out of
   - Free reserves
   - Securities Premium Account
   - Capital Redemption Reserve Account and not out of revaluation reserve created out of revaluation of assets
7. Ensure that the company which has once announced the decision of its Board recommending a bonus issue does not subsequently withdraw the same;
8. Check whether Return of allotment is filed with the registrar in Form PAS.3

(ii) As per section 63(2)(e) of the Companies Act, 2013

No company shall capitalise its profits or reserves for the purpose of issuing fully paid-up bonus shares under sub-section (1), unless the partly paid-up shares, if any outstanding on the date of allotment, are made fully paid-up. So, in the given case the company can not issue bonus to shareholders.

Answer 1(b)

Section 143(12) read with the Companies (Audit and Auditors) Amendment Rules, 2015 deals with an offence of fraud. If an auditor of a company in the course of the performance of his duties as auditor, has reason to believe that an offence of fraud which involves or is expected to involve individually an amount of a fraud involving lesser than rupees one crore (as in the given case it is rupee eighty lakhs), the auditor shall report the matter to audit committee or to the board immediately but not later than two days of his knowledge of the fraud and he shall report the matter specifying the following:

(a) Nature of fraud with description;

(b) Approximate amount involved; and

(c) Parties involved

Y should take the above course of action as a Company Secretary.

Answer 1(c)

As per section 12 of the Companies Act, 2013, no company shall change the place of its registered office from the jurisdiction of one Registrar to the jurisdiction of another Registrar within the same State unless such change is confirmed by the Regional Director on an application made in this behalf by the company in the prescribed manner mentioned as under.

Rule 28 of the Companies (Incorporation) Rules, 2014: Shifting of registered office within the same State

(1) An application seeking confirmation from the Regional Director for shifting the registered office within the same State from the jurisdiction of one Registrar of Companies to the jurisdiction of another Registrar of Companies, shall be filed by the company with the Regional Director in Form No.INC.23 along with the fee and following documents: -

(a) Board Resolution for shifting of registered office;

(b) Special Resolution of the members of the company approving the shifting of registered office;

(c) a declaration given by the Key Managerial Personnel or any two directors authorised by the Board, that the company has not defaulted in payment of dues to its workmen and has either the consent of its creditors for the proposed shifting or has made necessary provision for the payment thereof;

(d) a declaration not to seek change in the jurisdiction of the Court where cases for prosecution are pending;

(e) acknowledged copy of intimation to the Chief Secretary of the State as to the proposed shifting and that the employees' interest is not adversely affected consequent to proposed shifting.

The certified copy of order of the Regional Director, approving the alternation of memorandum for transfer of registered office company within the same State, shall be filed in Form No.INC-28 along with fee with the Registrar of State within thirty days from the date of receipt of certified copy of the order.

XYZ Ltd. has to comply as per above provisions.

Answers 1(d)

According to Foreign Direct Investment (FDI) Scheme of India, there are certain prohibited activities/sectors where Benjamin cannot make investment which includes Real Estate Business or Construction of Farm Houses. "Real estate businesses shall not include development of townships, construction of residential /commercial premises, roads or bridges and Real Estate Investment Trusts (REITs) registered and regulated under the SEBI (REITs) Regulations, 2014.

In view of above provisions, Benjamin is:

(i) Not allowed to invest in constructing farm houses in Mumbai.

(ii) Allowed to invest in construction a residential township in Noida (UP).

(iii) FDI in publishing of newspaper and periodicals dealing with news and current affairs can be done through government approval route. The checklist for the same is as under:

1. Whether prior approval of Foreign Investment Promotion Board (FIPB) is obtained for FDI which are in excess of sectoral cap.
2. Whether the shares issued to person who is a citizen of Bangladesh or an entity incorporated in Bangladesh/ Pakistan under the FDI Scheme is with the prior approval of the FIPB and is subject to the prohibitions applicable.
3. Whether the conversion of import payables / pre-incorporation expenses / share swap is treated as consideration for issue of shares with the approval of FIPB.
4. Whether the FDI in a non-SME has exceeded 24% of paid up capital or sectoral cap whichever is lower, if such non-SME has industrial licence for products reserved for SMEs. If so, prior approval of FIPB is obtained.
5. Whether there is any transfer of shares from resident to non-resident which requires FIPB approval.
6. Whether the Issue of shares to a non-resident against shares swap i.e., in lieu for the consideration which has been paid for shares acquired in the overseas company, can be done with the approval of FIPB.

Answer 1(e)

(i) There are certain registers which are mandatory for the company to make. Some of these are -

(a) Register of contracts or Arrangements in which Directors are interested under section 189 of Companies Act, 2013 as per form MBP 4 as prescribed under Companies (Meetings of Board and its Powers) Rules, 2014.

(b) Register of investments under section 187 of Companies Act, 2013 as per form MBP 3 as prescribed under Companies (Meetings of Board and its Powers) Rules, 2014.

Register of proxy is not statutory but statistical in nature and PCS is advised to comment about the maintenance of these registers though he need not to qualify his report in case of non-compliance. So, he is not right in qualifying its report for not maintaining the Register of Proxies.

(ii) He will check the following details in the Register of Proxies.

1. The register of proxies containing details of proxies lodged in respect of every general meeting is maintained.
2. All Proxies received by the company are recorded chronologically in a register kept for that purpose, in pursuance with Secretarial Standards.
3. In case any Proxy entered in the register is rejected, the reasons there of have been entered in the remarks column.

Answer 1A(i)

As per section 135(5) of the Companies Act, 2013, every company covered under section 135 is supposed to spend in every financial year at least 2% of the average net profit of the company made during the three immediately preceding financial years.

Further, for the purpose of section 135 of Companies Act, 2013, net profit shall be calculated in accordance with the provisions of section 198 of Companies Act, 2013. As per section 198(5) of Companies Act, 2013, Income Tax payable under Income Tax Act, 1961 will not be considered in computation of the Net Profit.

Accordingly, for the financial year 2018-19 the average profit for three immediately preceding financial years will be as follows: -

2017-18 : ₹650

2016-17 : ₹400

2015-16 : ₹240

Average profit will be ₹430 lakh [i.e. (650+400+240)/3 = ₹430 lakh

The total CSR expenses for the financial year 2018-19=2% of ₹430 = ₹8.60 lakh

Answer 1A(ii)

According to Companies (Significant Beneficial Owners) Amendment Rules, 2019, significant beneficial owner in relation to a reporting company means an individual referred to in sub-section (1) of section 90, who acting alone or together, or through one or more persons or trust, possesses one or more of the following rights or entitlements in such reporting company, namely:

(i) holds indirectly, or together with any direct holdings, not less than ten per cent of the shares;

(ii) holds indirectly, or together with any direct holdings, not less than ten percent of the voting rights in the shares;

(iii) has right to receive or participate in not less than ten per cent. of the total distributable dividend, or any other distribution, in a financial year through indirect holdings alone, or together with any direct holdings;

(iv) has right to exercise, or actually exercises, significant influence or control, in any manner other than through direct holdings alone.

Sen holds 60% shares in B Ltd. As indirect holding of Sen is 5% and Direct Holding of 8%. Therefore, total holding (indirect with direct holding (5+8) i.e. 13%.Condition of indirect together with direct holding 10% also complied.

Conclusion : Sen meets all the conditions to become Significant Beneficiary Owner. Therefore, Sen shall be considered as Significant Beneficiary Owner.

Answer 1A(iii)

Section 203 of the Companies Act, 2013 read with Rule 8A of the Companies (Appointment and Remuneration of Managerial Personals) Rules, 2014

Under the provisions of Section 203 of the Companies Act, 2013 read with Rule 8A of the Companies (Appointment and Remuneration of Managerial Personals) Rules, 2014, it is mandatory to appoint Company Secretary in case if the paid up capital of a Company is ₹10 crore or more. This limit has been increased from ₹5 to ₹10 crores w.e.f. 1st April 2020.

Since ABC Technologies Pvt Ltd. is a private company and has a paid up capital of not more than ₹10 crore, there is no default for non-compliance of the provisions of Section 203 of the Companies Act, 2013 read with Rule 8A of the Companies (Appointment and Remuneration of Managerial Personals) Rules, 2014 w.e.f. 1st April, 2020. However, prior to 1st April, 2020, the company was non-compliant as the threshold for appointment of Company Secretary till 31st March, 2020 was ₹5 crore. The justification by the company that "the company could not appoint although it has been making regular efforts to identify and appoint suitable candidate for the position" does not hold good.

As per section 203(5) of the Companies Act, 2013, if any prescribed company contravenes the provisions of this section relating to appointment of Key Managerial Personnel (KMP) (KMP includes company secretary also), a penalty of ₹5 lakhs can be imposed on the company in this case ABC Technologies Pvt Ltd. Also penalty of ₹50,000 on Director or key managerial person who is in default and further fine up to ₹1,000 for each day of default in case the contravention continues upto a maximum of ₹5 lakhs will be imposed.

Answer 1A(iv)

Rule 25A of the Companies (Incorporation) Rules, 2014 states following regarding Active Company Tagging Identities and Verification (ACTIVE) (INC-22A)

Every company incorporated on or before the 31st December, 2017 shall file the particulars of the company and its registered office, in e-Form ACTIVE (Active Company Tagging Identities and Verification) **on or before 15th June 2019.**

Provided also that in case a company does not intimate the said particulars, the Company shall be marked as "ACTIVE-non-compliant" on or after 16th July, 2019 and shall be liable for action under sub-section (9) of section 12 of the Companies Act, 2013:

Provided also that no request for recording the following event based information or changes shall be accepted by the Registrar from such companies marked as "ACTIVE-non compliant", unless "e-Form ACTIVE" is filed

(i) SH-07 (Change in Authorized Capital);

(ii) PAS-03 (Change in Paid-up Capital);

(iii) DIR-12 (changes in Director except in case of :

  (a) cessation of any director or

  (b) appointment of directors in such company where the total number of directors are less than the minimum number provided in clause (a) of sub-section (1) of section 149 on account of disqualification of all or any of the director under section 164.

  (c) appointment of any director in such company where DINs of all or any its director(s) have been deactivated.

  (d) appointment of director(s) for implementation of the order passed by the Court or Tribunal or Appellate Tribunal under the provisions of this Act or under the Insolvency and Bankruptcy Code, 2016).]

(iv) INC-22 (Change in Registered Office);

(v) INC-28 (Amalgamation, de-merger)

Where a company files "e-Form ACTIVE", **on or after 16th June, 2019**, the company shall be marked as "ACTIVE Compliant", on payment of fee of ten thousand rupees.

Answer 1A(v)

(a) Under the provisions of FEMA, 1999, the said financial assistance by Lira Inc. USA would be viewed as External Commercial Borrowings (ECB) by Lira India Private Ltd. The said financial assistance would be considered as debt and it should have confirmed to the ECB policy of RBI. Accordingly, all norms applicable for ECB viz. Eligible borrowers, recognition of lenders, amount and maturity, end use stipulations etc. shall apply in this case. Lira India should have compiled

with Directions regarding ECB issued by RBI under FEMA, 1999. As the same has not been done, it should file compounding applications voluntarily for the non-compliance of provisions of ECB guidelines as stipulated by RBI.

(b) The checklist for Issue of FCCBs is as under:

1. Check whether the fresh ECBs/ FCCBs is raised with the stipulated average maturity period and applicable all-in-cost being as per the extant ECB guidelines.
2. The amount of fresh ECB/FCCB shall not exceed the outstanding redemption value at maturity of the outstanding FCCBs.
3. The fresh ECB/FCCB shall not be raised six months prior to the maturity date of the outstanding FCCBs.
4. ECB / FCCB beyond USD 500 million for the purpose of redemption of the existing FCCB will be considered under the approval route.
5. The proposal of Buyback / prepayment of FCCBs from Indian Companies may be considered subject to the condition that the buyback value of the FCCBs shall be at a minimum discount of five per cent on the accreted value.

PART — B

Attempt all parts of either Q. No. 2 or Q. No. 2A

Question 2

(a) N Ltd. is an unlisted public company incorporated in India. It issued ₹1 crore Partially Convertible Debenture (PCD) with a face value of ₹100 each. Against the above issue, out of the face value of ₹100; ₹50 will be converted into one equity share after 5 years and remaining ₹50 will be redeemed equally in two financial years i.e. financial year 2019-20 and the financial year 2020-21 on 30th March every year.

Citing the relevant provisions of the Companies Act, 2013 :

(i) Calculate the amount of investment the company is required to make for the financial year 2019-20; and

(ii) Calculate the amount of Debenture Redemption Reserve as on 1st April, 2020. (3+1+1=5 marks)

(b) (i) XYZ Ltd. a public unlisted company engaged in business of transportation, is having three layers of subsidiary as on 31st March, 2016. The company secretary advises the Board of directors to reduce the layers of subsidiaries to two only. Is he right in advising so ? What course of action should the company take in this regard ?

(ii) What will be the consequences which any company may face for non-fulfilling the provisions under the Companies (Restriction on number of layers) Rules, 2017 ? (4+1=5 marks)

(c) Define unpublished price sensitive information and examine whether the following information will be treated as unpublished price sensitive information as per

provisions under the Securities Exchange Board of India (SEBI) (Prohibition of Insider Trading) Regulations, 2015.

(i) The CEO of the company dies in a plane crash.

(ii) The company is in negotiation with a foreign company to sell its stake in ABC Ltd.

(iii) The company is intended to declare bonus to its shareholder.

(2+1+1+1=5 marks)

OR (Alternate Question to Q. No. 2)

Question No. 2A

(i) MCA-21 offers the facility to view documents and also search and other facilities of public documents online.

(a) Explain the procedure for viewing such documents filed by the company with Registrar of Companies.

(b) Can we view documents relating to charges on MCA website ?

(4+1=5 marks)

(ii) XX Pvt. Ltd. has entered into an agreement with one of the most reputed car manufacturers of the country. The terms and conditions of an agreement are as follow :

(a) Car manufacturer has restricted XX Pvt. Ltd. from acting as dealers of competing brands without their prior consent.

(b) Car manufacturer has fixed the maximum retail price of the cars (which included the pre-fixed margin of the dealers) and the maximum discount which could be offered by the dealers through its Discount Control Mechanism (DCM).

(c) Car manufacturer mandated its dealers to purchase engine oil only from its two designated vendors, at the price indicated by car manufacturer in its circular. In case of non-compliance by the dealer, car manufacturer put the condition to terminate the dealership agreement.

Examine whether this agreement is valid under the Competition Act, 2002 in respect of clauses mentioned above. (5 marks)

(iii) How an escrow amount is calculated under Regulation 17 of the Securities Exchange Board of India (SEBI) (Substantial Acquisition of Shares and Takeovers) (SAST) Regulations, 2011. List out the payment modes of escrow account also.

(3+2=5 marks)

Answer 2(a)

As per section 71 of the Companies Act, 2013 read with Rule 18 of the companies (share capital and debenture) Rules, 2014 and as per sub rule 7 -

Every company which is required to make debenture redemption reserve, shall on or before the 30th day of April in each year, in respect of debentures issued by such a

company, invest or deposit, a sum which shall not be less than fifteen percent, of the amount of its debentures maturing during the year, ending on the 31st day of March of the next year.

Further as per sub rule 7(iv), other unlisted companies (other than Non-Banking Financial Company and All India Financial Institution regulated by RBI), the adequacy of Debenture Redemption Reserve shall be ten percent. of the value of the outstanding debentures .

Further, in case of partly convertible debentures, Debenture Redemption Reserve shall be created in respect of non-convertible portion of debenture issue.

(i) The investment the company is required to make for the financial year 2019-20:

In the above case in the year 2019-20 the amount which is getting matured is as follows:

S. No.	*Particulars*	*Amount in (₹)*
1	Value of 1 crore debenture of ₹100 each	100 crore
	Less: Value of 1 crore debenture of ₹50 each to be converted into Equity Share after 5 Years	50 crore
2	Total Value of 1 crore debenture to be redeemed (i.e. non convertible debenture)	50 crore
3	Amount of debentures maturing during the year 2019-20 i.e. 50% of S. No. 2	25 crore

Therefore, the amount of investment the company is required to be make for the financial year 2019-20 is 15% of 25 Crore = ₹3.75 crore

(ii) Accordingly, as on 1st April, 2020 the calculation of Debenture Redemption Reserve is as follows:

- Total Value of 1 crore debenture outstanding as on 1st April, 2020 = ₹25 crore
- Debenture Redemption Reserve (DRR) is 10% of ₹25 crore = ₹2.5 crore

Alternate Answer 2(a)

As per section 71 of the Companies Act, 2013 read with Rule 18 of the companies (share capital and debenture) Rules, 2014 and as per sub rule 7 -

Every company which is required to make debenture redemption reserve, shall on or before the 30th day of April in each year, in respect of debentures issued by such a company, invest or deposit, a sum which shall not be less than fifteen percent, of the amount of its debentures maturing during the year, ending on the 31st day of March of the next year.

Further as per sub rule 7(iv), other unlisted companies (other than Non-Banking Financial Company and All India Financial Institution regulated by RBI), the adequacy of Debenture Redemption Reserve shall be ten percent. of the value of the outstanding debentures .

Further, in case of partly convertible debentures, Debenture Redemption Reserve shall be created in respect of non-convertible portion of debenture issue.

(i) The investment the company is required to make for the financial year 2019-20:

In the above case in the year 2019-20 the amount which is getting matured is as follows:

S. No.	*Particulars*	*Amount in (₹)*
1	Value of 1 lakh debenture of ₹100 each	100 lakh
	Less: Value of 1 lakh debenture of ₹50 each to be converted into Equity Share after 5 Years	50 lakh
2	Total Value of 1 lakh debenture to be redeemed (i.e. non convertible debenture)	50 lakh
3	Amount of debentures maturing during the year 2019-20 i.e. 50% of S. No. 2	25 lakh

Therefore, the amount of investment the company is required to be make for the financial year 2019-20 is 15% of 25 Lakh = ₹3.75 Lakh

(ii) Accordingly, as on 1st April, 2020 the calculation of Debenture Redemption Reserve is as follows:

- Total Value of 1 Lakh debenture outstanding as on 1st April, 2020 = ₹ 25 Lakh
- Debenture Redemption Reserve (DRR) is 10% of ₹ 25 Lakh = ₹ 2.5 Lakh

Answer 2(b)

(i) The Companies (Restriction on number of layers) Rules, 2017

Restriction on number of layers for certain classes of holding companies

Sub-Rule (4) of rule (2) Every company, other than a company referred to in sub-rule (2), existing on or before the commencement of these rules, which has number of layers of subsidiaries in excess of the layers specified in sub-rule (1)

(i) shall file, with the Registrar a return in Form CRL-1 disclosing the details specified therein, within a period of one hundred and fifty days from the date of publication of these rules in the Official Gazette;

(ii) shall not, after the date of commencement of these rules, have any additional layer of subsidiaries over and above the layers existing on such date; and

(iii) shall not, in case one or more layers are reduced by it subsequent to the commencement of these rules, have the number of layers beyond the number of layers it has after such reduction or maximum layers allowed in sub-rule (1), whichever is more.

Conclusion : In this case, XYZ Ltd. is having three layers as on 31st March, 2016 which is before the commencement of these rules, hence the company need not to

reduce its layers. Instead, the company need to file Form CRL-1 as discussed above. So, company secretary is not right in advising the company.

(ii) If any company contravenes any provision of the Companies (Restriction on number of layers) Rules, 2017, the company and every officer of the company who is in default shall be punishable with fine which may extend to ten thousand rupees and where the contravention is a continuing one, with a further fine which may extend to one thousand rupees for every day after the first during which such contravention continues.

Answer 2(c)

As per regulation 2(n) of SEBI (Prohibition of Insider Trading) Regulations, 2015, "unpublished price sensitive information" means any information, relating to a company or its securities, directly or indirectly, that is not generally available which upon becoming generally available, is likely to materially affect the price of the securities and shall, ordinarily including but not restricted to, information relating to the following:

(a) financial results;

(b) dividends;

(c) change in capital structure;

(d) mergers, demergers, acquisitions, delistings, disposals and expansion of business and such other transactions;

(e) changes in key managerial personnel.

In case (i), it is considered as an unpublished price sensitive information since it is covered under point e of regulation 2(n) of SEBI (Prohibition of Insider Trading) Regulations, 2015..

In case (ii), it is considered as an unpublished price sensitive information since it is covered under point d of regulation 2(n) of SEBI (Prohibition of Insider Trading) Regulations, 2015.

In case (iii), it is considered as unpublished price sensitive information since it is covered under point c of regulation 2(n) of SEBI (Prohibition of Insider Trading) Regulations, 2015.

Answer 2A(i)

(a) MCA-21 offers the facility to view documents and also search and other facilities of public documents. This facility is handy for users and banks and financial institutions while sanctioning loans. The procedure for viewing such documents is as follows:

(a) User has to access My MCA portal and login to the My MCA portal.

(b) After Log in click on tab MCA Service and View Public Document.

(c) Mention name of Company and make payment of ₹100/-

(d) Click on the 'Work space' tab.

(e) List of company names will be displayed, for which user have already paid for public viewing. It also displays the following:

(i) Date of request i.e. the date, when user made the request to view the company document.

(ii) Status of the request i.e. whether viewed or to view.

(f) Click on the view link under status field.

(g) The documents are grouped under categories i.e. user has to click on the desired category under which the document falls.

(h) If more than one document is listed, the user can arrange them name wise or date wise.

(i) On clicking the document name, the document shall be displayed for viewing.

(b) The public documents under this facility are available for viewing by public on payment of requisite fee. Public documents include charge documents. So, we can view documents relating to charges on MCA website.

Answer 2A(ii)

(a) Exclusive Supply Agreement and Refusal to Deal : The requirement to get prior consent from Car manufacturer for dealing with competing brands was not a prohibition. Hence, it did not amount to an exclusive supply agreement under Section 3(4)(b) and/or refusal to deal under Section 3(4)(d) of the Act. Hence this clause is valid under Competition Act, 2002.

(b) Resale Price Maintenance : Fixing of a maximum retail price and maximum permissible discount which could be given by dealers effectively amounts to setting a minimum resale price, thereby resulting in Resale Price Maintenance. Hence this clause is not valid under Section 3(4)(e) of the Competition Act, 2002.

(c) Tie-in Arrangement : Car manufacturer mandated its dealers to purchase engine oil only from its two designated vendors, at the price indicated by car manufacturer in its circular. In case of non-compliance by the dealers, car manufacturer threatened to terminate the dealership agreement. This practice will result in price discrimination, without accruing any benefit to the dealers or consumers, thereby contravening Section 3(4)(a) of the Act. Hence this clause is not valid.

Hence, Car manufacturer is engaging in the practices of resale price maintenance (RPM) and tie-in arrangement in contravention of the provisions of Sections 3(4)(e) and 3(4)(a) read with Section 3(1) of the Competition Act, 2002. Therefore, this agreement between XX Pvt Ltd. and a car manufacturer is not valid as per Competition Act, 2002.

Answer 2A(iii)

The escrow amount shall be calculated in the following manner, as specified in regulation 17 of Securities Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 2011,-

For consideration payable under the public offer,-

Sl. No.	*Consideration payable under the Open Offer*	*Escrow Amount*
a.	On the first five hundred crore rupees	an amount equal to twenty-five per cent of the consideration
b.	On the balance consideration	an additional amount equal to ten per cent of the balance consideration

If, an open offer is made conditional upon minimum level of acceptance, hundred percent of the consideration payable in respect of minimum level of acceptance or fifty per cent of the consideration payable under the open offer, whichever is higher, shall be deposited in cash in the escrow account.

The escrow account may be in the form of,:

(a) cash deposited with any scheduled commercial bank;

(b) bank guarantee issued in favour of the manager to the open offer by any scheduled commercial bank; or

(c) deposit of frequently traded and freely transferable equity shares or other freely transferable securities with appropriate margin as specified under the regulation.

Question 3

(a) Comment upon each of the following citing relevant provisions of the Companies Act, 2013 :

(i) Shanoo is a whole-time Director of a listed entity and got invitation to join the Board of another four listed entities as an Independent Director.

(ii) Shanoo is an independent Director on the Board of X Ltd. X Ltd. had some unfair trade practices unintentionally. Such incidents were discussed at the Board meeting of X Ltd. where Shanoo was present. Subsequently, Government probed the matter and imposed a penalty of ` 2 crore on X Ltd. The Board of X Ltd. decided to recover that penalty amount from all the Directors of the company. Shanoo defended his position saying that he is only an Independent Director of the company and is not involved in day to day affairs of the company and hence will not pay his share of penalty.

(iii) As a fall out cited above, Shanoo resigned from the company on 15th June 2019. Board accepted the resignation and appointed another person as an Independent Director in place of Shanoo on 18th September 2019.

(2+3+3=8 marks)

(b) Smith is a Swiss national and also the Managing Director (MD) of Front India Ltd. The said company had obtained loan from consortium of banks to a tune of ₹ 12,000 crore. There are about 9 banks involved in providing the loan. Loan was granted in November 2014. The company was regular at its payment of interest and loan instalment as per agreed terms and conditions of loan agreement

till November 2017. However due to downfall of business, the company could not pay its interest and loan instalment since November 2017. There were also reports that the company is irregular at its salary payments to its employees since December 2018 and the MD is absconding as he fled out of India and settled in Switzerland.

The banks have decided to approach the court to declare the company as 'willful defaulter'. The company has sufficient assets to meet its obligations to the banks.

The Board is divided on the opinion on the claims made by the consortium of banks and is contemplating to defend the case in the court in not declaring the company as a 'willful defaulter'.

As a Company Secretary in Practice, examine the above situation and advise the consortium of banks whether they will succeed in their claim before the Court of Law. *(7 marks)*

Answer 3(a)

The Companies Act, 2013, provides that the listed companies are required to comply with the provisions of the Securities and Exchange Board of India Act, 1992 and the rules and regulations made thereunder. Therefore, the cases provided are examined on the basis of provisions of Companies Act, 2013 and SEBI (LODR), Regulations, 2015.

Case (i) : As per Section 165(1), no person, after the commencement of Companies Act, 2013, shall hold office as a director, including any alternate directorship, in more than twenty companies at the same time. Provided that the maximum number of public companies in which a person can be appointed as a director shall not exceed ten.

As per Section 203 (3), a whole-time key managerial personnel shall not hold office in more than one company except in its subsidiary company at the same time.

Provided that nothing contained in sub-section (3) of Section 203 shall disentitle a key managerial personnel from being a director of any company with the permission of the Board.

According to regulation 17A of SEBI (LODR) Regulations, 2015, the directors of listed entities shall comply with the following conditions with respect to the maximum number of directorships, including any alternate directorships that can be held by them at any point of time:

(1) A person shall not be a director in more than eight listed entities with effect from April 1, 2019 and in not more than seven listed entities with effect from April 1, 2020:

Provided that a person shall not serve as an independent director in more than seven listed entities.

(2) Notwithstanding the above, any person who is serving as a whole time director / managing director in any listed entity shall serve as an independent director in not more than three listed entities.

In view of the above, Shanoo cannot become an Independent Director in more than three listed entities.

Case (ii) : As per section 149(12) of the Companies Act, 2013, Notwithstanding anything contained in Companies Act, 2013, an independent director; shall be held liable, only in respect of such acts of omission or commission by a company which had occurred with his knowledge, attributable through Board processes, and with his consent or connivance or where he had not acted diligently.

According to Regulation 25 (5) of SEBI (LODR) Regulations, 2015, an Independent Director shall be held liable, only in respect of such acts of omission or commission by the listed entity which had occurred with his knowledge, attributable through processes of board of directors and with his consent or connivance or where he had not acted diligently with respect to the provisions contained in these regulations.

Going by the above, nowhere it is stated in the given case that Shanoo was party to the unfair trade practices committed by the company. So, Shanoo is right in rejecting the claim by the company.

Case (iii) : As per Schedule IV, clause VI (2) of the Companies Act, 2013, an independent director who resigns or is removed from the board of the company shall be replaced by a new independent director within three months from the date of such resignation or removal, as the case may be.

Further, Schedule IV, clause (VI) (3) of Companies Act, 2013 states that where the company fulfils the requirement of independent directors in its Board even without filling the vacancy created by such resignation or removal, as the case may be, the requirement of replacement by a new independent director shall not apply.

According to above Regulation 25 (6) of SEBI (LODR) Regulations, 2015, an independent director who resigns or is removed from the board of directors of the listed entity shall be replaced by a new independent director by listed entity at the earliest but not later than the immediate next meeting of the board of directors or three months from the date of such vacancy, whichever is later:

Proviso to said regulations states that where the listed entity fulfils the requirement of independent directors in its board of directors without filling the vacancy created by such resignation or removal, the requirement of replacement by a new independent director shall not apply.

In view of the above provisions, the replacement of Shanoo is necessary if the company does not fulfil the requirement of Independent Director without filling the vacancy created by such resignation.

Further, if the company fulfils the requirement of independent directors in its Board even without filling the vacancy created by such resignation, the requirement of replacement by a new independent director shall not apply.

Answer 3(b)

The said matter is to be examined whether it would fit into the definition of "Wilfull default".

A "willful default" would be deemed to have occurred if any of the following events is noted:-

(a) The company has defaulted in meeting its payment/repayment obligations to the lender even when it has the capacity to honour the said obligations.

(b) The company has defaulted in meeting its payment/repayment obligations to

the lender and has not utilised the finance from the lender for the specific purposes for which finance was availed of but has diverted the funds for other purposes.

(c) The company has defaulted in meeting its payment/repayment obligations to the lender and has siphoned off the funds so that the funds have not been utilised for the specific purpose for which finance was availed of, nor are the funds available with the unit in the form of other assets.

In order to prevent the access to the capital markets by the willful defaulters, a copy of the list of willful defaulters (non-suit filed accounts) and list of willful defaulters (suit-filed accounts) are forwarded to SEBI by RBI and Credit Information Bureau (India) Ltd. (CIBIL) respectively.

In the given case smith has borrowed money on behalf of the Company and no where it is stated that it was utilised other than purpose for which it was borrowed. Also the Company has sufficient assets to repay the loan and the Board of Directors can always dispose the assets to pay the liabilities. Non Payment of the salary to the employees or the MD's disappearance from India, can not be ground in declaring a Company a "wilful defaulter". With these facts in place, the consortium of banks will not succeed in their claim before the Court of Law.

Question 4

(a) What undertaking should Information Receiving Party make while entering the Non-disclosure Agreement with an organisation where it is ought to conduct due diligence ? (5 marks)

(b) Explain the procedure for investigation of Combinations' under Combination Regulations of the Competition Law. Give an illustrative check list on Regulation of Combinations also. (2+3=5 marks)

(c) (i) It is important to conduct "Legal Health Check" of a corporate organization during certain corporate transactions. Name some of these occasions.

(ii) Is company secretary, a competent professional for carrying-out legal health check of an organisation ? (3+2=5 marks)

Answer 4(a)

The information receiving party should make the below undertaking while entering the Non-disclosure agreement with the organization:

(i) to keep confidential and not disclose to any third party, copy, reproduce, adapt, divulge, publish or circulate any part of or the whole of any Confidential Information without the prior written consent of the Disclosing Party; and

(ii) to restrict access to the Confidential Information disclosed to it under this Agreement to those of its employees and officers who need to know the same strictly for the Purpose; and

(iii) not to use Confidential Information disclosed to it under this Agreement for any purpose other than the Purpose; and

(iv) not to combine any part of or the whole of the Confidential Information with any other information; and

(v) not to disclose the whole or any part of the Confidential Information to any third party without

(a) the prior written consent of the Disclosing Party and

(b) prior to disclosure to such third party procuring that the third party is bound by obligations which are no less onerous than those contained in this Agreement; and

(vi) to procure that each employee and officer to whom Confidential Information is disclosed under this Agreement is, prior to such disclosure, informed of the terms of this Agreement and agrees to be bound by them; and

(vii) to procure that the Confidential Information in its possession is stored securely and that physical access to it is controlled.

Answer 4(b)

The procedure for investigation of 'Combinations' as per Combination Regulation is as under:

As per the Combination Regulations, the Competition Commission of India (CCI) shall form its prima facie opinion as to whether the combination is likely to cause or has caused appreciable adverse effect on competition within the relevant market in India within 30 days from the receipt of the notice. If the Commission is prima facie of the opinion that a combination has caused or is likely to cause adverse effect on competition in Indian markets, it shall issue a notice to show cause to the parties as to why investigation in respect of such combination should not be conducted. On receipt of the response, if Commission is of the prima facie opinion that the combination has or is likely to have appreciable adverse effect on competition, the Commission shall deal with the notice as per the provisions of the Competition Act, 2002.

Checklist of Regulation of Combinations:

1. The threshold transaction qualified as a "combination" under Section 5 of the Competition Act, 2002 it will have to mandatorily be notified to the CCI, and the transaction has taken effect only after 210 days of such notification or from the date the CCI passes an order approving the proposed "combination", whichever is earlier.

2. Mandatory notice to the CCI is filed, in case of merger or amalgamation, within 30 working days of approval of the proposal relating to merger or amalgamation by the board of directors of the enterprises concerned.

3. Mandatory notice to the CCI is filed, in case of acquisition or acquiring of control, within 30 days of execution of any agreement or other document. Such 'other document' is defined to include any binding document conveying an agreement or decision to acquire control.

4. Notice was given to CCI is in terms of the Procedural Regulations issued by CCI.

5. There is no premature pre-closing activity involving sharing of competitively sensitive information or joint marketing, production.

6. If, the transaction involves any substantive competition/antitrust risk, the risk is allocated amongst the parties to the transaction.

Answer 4(c)

(i) It is important to conduct "Legal Health Check" of a corporate organisation during certain corporate transaction. The need for legal due diligence may occur in the following occassion:

1) Mergers/Acquisitions
2) Corporate Restructuring
3) Corporate Governance related matters
4) IPOs/FPOs
5) Private Equity
6) General Compliance requirement.
7) Commercial agreements
8) Leveraged buy-outs
9) Joint Ventures, etc.

(ii) The Company Secretary is a competent professional who comes in existence after exhaustive exposure provided by the Institute of Company Secretaries of India through coaching, examinations, rigorous training and continuing education programmes. The course curriculum includes papers on subject such as Financial Management, Financial Accounting, Company Accounts, Cost & Management Accounting, Financial Treasury and Forex Management, Securities Laws and an exclusive paper on 'Due Diligence and corporate compliance management. Company Secretary, thus, has vast theoretical knowledge base and practical experience and exposure in various laws and financial aspects. As a Compliance Management specialist, a Company Secretary is competent to discharge the Legal Due diligence/legal health check up process efficiently.

Question 5

(a) Write short notes on the following :

(i) Cartels;

(ii) Significance of Corporate Compliance Management; and

(iii) Check list for Security Offered on the Term Loan. (3 marks each)

(b) Distinguish between the following :

(i) Foreign Currency Convertible Bonds (FCCBs) and Global Depository Receipts (GDR); and

(ii) Form F-6 and Form 6-K as prescribed under Securities and Exchange Commission (SEC). (3 marks each)

Answer 5(a) (i)

Cartel

Cartel is defined under section 2(c) of Competition Act, 2002. According to the definition "cartel" includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control, or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

Answer 5(a)(ii)

Corporate Compliance Management is significant to ensure the following:

1. Better compliance of the law.
2. Real time status of legal/statutory compliances.
3. Safety valve against unintended non compliances/ prosecutions, etc.
4. Real time status on the progress of pending litigation before the judicial/quasi-judicial fora.
5. Cost savings by avoiding penalties/fines and minimizing litigation.
6. Better brand image and positioning of the company in the market.
7. Enhanced credibility/creditworthiness that only a law abiding company can command.
8. Goodwill among the shareholders, investors, and stakeholders.
9. Recognition as Good corporate citizen.
10. Positive results at several levels.

Answer 5(a)(iii)

Checklist for security offered on the Term Loan

Verify the following as regards security offered on the term loan, and subsequent acquisition of Assets:

(1) Assets acquired pursuant to the loan agreement are in line with the terms of the sanction;

(2) Assets purchased from the money advanced/to be advanced, if not brought upon/fixed to the factory premises, have been hypothecated with the bank(s)/ financial institution(s)/commercial bank;

(3) The company has not entered into any arrangement with the creditors, nor has any act or default been committed, as would render the company liable to be taken into liquidation;

(4) Where guarantees have been furnished, in the event of death of a guarantor, his heirs have not given notice of revocation; and

(5) In the opinion of the assessors/valuers appointed by the company the value of

the security has not become insufficient or depreciated beyond norms prescribed in the indenture.

Answer 5(b)(i)

Foreign Currency Convertible Bonds (FCCBs): FCCBs mean a bond issued by an Indian company expressed in foreign currency, and the principal and interest in respect of which is payable in foreign currency. The bonds are required to be issued in accordance with the scheme viz., "Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depositary Receipt Mechanism) Scheme, 1993", and subscribed by a non-resident in foreign currency and convertible into ordinary shares of the issuing company in any manner, either in whole, or in part, on the basis of any equity related warrants attached to debt instruments. FCCBs are issued in accordance with the Foreign Currency Convertible Bonds and Ordinary Shares (through depository receipt mechanism) Scheme 1993.

Global Depository Receipts (GDR): As per Section 2(44) of the Companies Act, 2013 "Global Depository Receipt" means any instrument in the form of a depository receipt, by whatever name called, created by a foreign depository outside India and authorised by a company making an issue of such depository receipts. According to Section 41 of Companies Act, 2013, a company may, after passing a special resolution in its general meeting, issue depository receipts in any foreign country in such manner, and subject to such conditions, as may be prescribed. GDRs have access usually to Euro market and US market. The US portion of GDRs to be listed on US exchanges should comply with SEC requirements and the European portion is to comply with EU directive.

Answer 5(b)(ii)

Form F-6 – Registration of depository shares evidenced by GDRs/ADRs

Form F-6 is used for the registration of Depository shares as evidenced by Depository Receipts that are issued by a depository bank against the deposit of securities of an Indian Company. The information is prepared by the company under the guidance of the depository bank at the inception of either an unsponsored or sponsored program. This has to be signed by both Issuer and depository and to be declared as effective before issuance of Depository Receipts. The depository agreement is to be filed as an exhibit along with this document.

Form 6K

Form 6k is to be filed with Securities Exchange Commission by a foreign private issuer, pursuant to Rule 13a-16 or 15d-16 under the Securities Exchange Act of 1934 to provide information that is required to be made public in the country of its domicile.

Question 6

(a) Your company is engaged in the business of sugar manufacturing. You have been instructed by the government to conduct environmental due diligence since the government has apprehensions that your company is causing damage to the environment. What process will you undertake while conducting environmental due diligence ? *(5 marks)*

(b) (i) Mehra is appointed as the compliance officer of the company. He found box ticking practices are adapted by the organisation. Under which category will this practice fall ?

(ii) Write other two categories of compliance in this regard ?

(2+3=5 marks)

(c) Gopi Ltd. proposes to come out with a public issue of ₹1,200 crore comprising of equity shares of ₹900 crore and convertible debentures of ₹300 crore. Advise the company as a Company Secretary in Practice as to what should be minimum offer to the public in terms of Rule 19 of the Securities Contracts (Regulations) Rules, 1957 citing the relevant provision(s). Also advise what should be minimum offer to the public in case the issue size is ₹5,000 crore comprising only of equity shares. (5 marks)

Answer 6(a)

The process of Environmental due diligence will include:

1. Company analysis shall be done as the first step and it includes:
   i. Business assessment
   ii. Sites assessments
   iii. Products assessment
   iv. Process assessment
   v. Safety standards
   vi. Pollution control mitigation measures
2. Media Report Analysis shall be done after the company analysis.
3. Stakeholders analysis shall be done after the analysis of media reports.
4. Regulatory Analysis (Potential Compliance Risks) is to be done after stakeholder analysis and which includes:
   i. Regulatory compliance check lists
   ii. Non compliance details from Regulatory authorities
5. Risk analysis matrix shall be done after the regulatory analysis, which includes the following:
   i. Nature of business
   ii. Area of operations
   iii. Potential Issues
   iv. Impact Assessment
   v. Mitigation measures
   vi. Management plan
6. The Reporting and suggestions is to be made at the last.

Answer 6(b)

(i) Box ticking practices will fall under Adequate Compliances. Adequate compliance is compliance in letters. The aspects specified in law are compiled in letters, without getting into the spirit of the law.

(ii) The other two categories of compliance in this regard are:

(a) Apparent compliance is a disguise form of non-compliance, which is worse than a non compliance. The classic example for Apparent Compliances are generating documents such as notice, agenda, minutes on papers for board and general meeting which are not actually held.

(b) Absolute compliances are those which are in line with the spirit and intent of the law. A typical example in this regard is demonstrating shareholder democracy as prescribed by law. When a company complies with law in spirit it gains public confidence as well. For example, Infosys has set new and effective standards in communicating with shareholders, stock exchanges and general public at large. Its Annual Report is said to be a trend setter and has been commended as an ideal report by SEC. This company has demonstrated through its practices and procedures its commitment to enhance investor-relations and has amply rewarded its shareholders through its impressive performance and its value based management philosophy helps increase its brand value. The company has achieved trust of stakeholders by having a strategic balance between wealth and welfare.

Answer 6(c)

Minimum offer to the Public

. The Minimum net offer to the Public shall be subject to the provisions of sub-clause (b) of Sub-rule (2) of Rule 19 of Securities Contracts (Regulations) Rules, 1957. According to the said rules, the minimum offer and allotment to pubic in terms of an offer document shall be-

(i) atleast twenty five percent of each class or kind of equity shares or debentures convertible into equity shares issued by the company, if the post issue capital of the company calculated at offer price is less than or equal to one thousand six hundred crore rupees;

(ii) atleast such percentage of each class or kind of equity shares or debentures convertible into equity shares issued by the company equivalent to the value of four hundred crore rupees, if the post issue capital of the company calculated at offer price is more than one thousand six hundred crore rupees but less than or equal to four thousand crore rupees;

(iii) atleast ten percent of each class or kind of equity shares or debentures convertible into equity shares issued by the company, if the post issue capital of the company calculated at offer price is above four thousand crore rupees.

Going by the above provisions, in the first instance case scenerio, the company should make a minimum offer of atleast 25% of equity and 25% of debenture to the public as the total issue size is less than ₹1600 crores.

Minimum offer for Equity Share to the public: 25 % of Total Equity Shares of Public Issue

25% of ₹900 crore = ₹ 225 Crore

Minimum offer for Debenture to the public: 25 % of Total Debentures of Public Issue

25% of ₹300 crore = ₹75 Crore

In the second case scenerio, the minimum offer to the public should be at least 10% of the issue size of ₹5000 crores as it is above four thousand crore rupees.

Minimum offer for Equity Share to the public: 10 % of Total Equity Shares of Public Issue

10% of ₹5000 crore = ₹500 Crore

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CORPORATE RESTRUCTURING, VALUATION AND INSOLVENCY

Time allowed : 3 hours *Maximum marks : 100*

NOTE : *1. Answer ALL Questions.*

2. All references to sections relate to the Companies Act, 2013 unless stated otherwise.

PART A

Question 1

(a) "Approval of a scheme of amalgamation between two banking companies requires Board of Directors of the involved banking Companies to pay attention particularly on certain matters."

Explain briefly the guidelines mandated by Reserve Bank of India in this regard.

(b) "Profit on slump sale is a capital receipt." Explain and support the statement with decided case laws.

(c) "A bungled corporate restructuring scheme can turn a good idea into a disaster." In the light of the given statement outline the keys for a successful corporate restructuring' scheme.

(d) One of the parties to a combination, situated outside India, is likely to have appreciable adverse effect on competition in India. Discuss the jurisdiction of the Competition Commission of India to inquire into such combinations and to pass orders. *(5 marks each)*

Answer 1(a)

Reserve Bank of India, being the approving authority for cases of amalgamation of Banking Companies issued Directions in April 2016. According to Paragraph 9 of the said Direction, Boards of Directors of the concerned Banking Companies need to give particular attention on the followings before approving the amalgamation proposal.

I. The values or revision in values at which the assets, liabilities and the reserves of the amalgamated company are taken;

II. Due diligence of the amalgamated company;

III. Swap ratio properly determined by independent valuers;

IV. Shareholding pattern, post amalgamation is not contrary to the Reserve Bank guidelines;

V. Profitability impact and maintenance of capital adequacy ratio after amalgamation; and

VI. Changes that may occur in composition of Board of Directors that are not inconsistent with the directions or sanctions by Reserve Bank of India Thus the Directors in the respective Board Meetings need to be particular as well as meticulous.

Answer 1(b)

A slump sale means a sale has a lump sum price as consideration without attributing values to individual assets and liabilities disposed. Normally, sale of a capital asset results in capital receipt and any profit derived is liable for capital gains in certain cases. This is also true in the case of sale of an undertaking.

Supreme Court in the case of *CIT* v. *West Coast Chemicals and Industries Ltd.* – 46 ITR 135 held that a slump price paid is an appreciation of capital but not a profit arising out of trading. Further in *CIT* v. *Mugneeram Bangur and Co.*, - 57 ITR 299 it was held that the mere fact that in the schedule the price of land was stated does not lead to the conclusion that part of the slump price is attributable to the land. Gujrat High Court also recognised that sale of undertaking as a going concern creates liability of Capital Gains tax.

Answer 1(c)

A good restructuring scheme involves a lot of planning. Equally important is the implementation of the scheme. Some keys for a successful corporate restructuring scheme may be as follows:

1. Focus first on the longer-term strategic aspirations.
2. Take time to develop an accurate, verifiable picture of today's structures, processes, and people.
3. Select the right blueprint carefully by creating multiple options and testing them under present scenario.
4. Consider all three elements of organizational design: structure, processes and people.
5. Fill well-defined roles in an orderly, transparent way.
6. Identify and actively change the necessary mind-sets. Do not assume that people will automatically fall in line.
7. Use metrics to measure short- and long-term results.
8. Make sure business leaders communicate, and create a powerful redesign narrative to inspire and mobilize the company.
9. Monitor and mitigate transitional risks, such as interruptions to business continuity, loss of talent, and customer-care lapses.

Answer 1(d)

Extra Territorial Jurisdiction of Commission

Section 32 of the Competition Act, 2002 extends the jurisdiction of Competition Commission of India to inquire and pass orders in accordance with the provisions of the Act into an agreement or dominant position or combination, which is likely to have, an appreciable adverse effect on competition in relevant market in India, notwithstanding that,

(a) an agreement referred to in section 3 has been entered into outside India; or

(b) any party to such agreement is outside India; or

(c) any enterprise abusing the dominant position is outside India; or

(d) a combination has taken place outside India; or

(e) any party to combination is outside India; or

(f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India.

Hence if any one of the parties to a combination is situated outside India but having an effect on competition in India, it will be subject to the jurisdiction of Commission. The Competition Commission of India will have jurisdiction if combination entered into has an appreciable adverse effect on competition in the relevant market of India and can pass appropriate orders.

Attempt all parts of either Q. No.2 or Q. No. 2A

Question 2

(a) "Corporate Restructuring is the panacea for every corporate turbulence." Elucidate.

(b) Which is a better option; an over-capitalized company or an under-capitalized company ? Support your answer with reasons. Also suggest some remedies to rectify both in a company.

(c) "Amendments brought in on 8th August, 2017 to Lesser Penalty Regulations will bring clarity to the existing leniency regime in India and provide incentives for companies and individuals to proactively assist in cartel enforcement under Competition Act, 2002." Elucidate. (5 marks each)

OR (Alternate Question to Q. No. 2)

Question 2A

(i) "Once open offer is made there is no question of withdrawal yet there are exceptions." Comment with your views in terms of the provisions of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 2011- SAST Regulations.

(ii) "In any merger or amalgamation taking care of financial aspects is of prime importance." Highlight at least five financial aspects that you would consider important whether it is a case of amalgamation or merger.

(iii) What is a depository receipt ? Discuss the benefits of depository receipt as a means of funding of mergers and takeovers. (5 marks each)

Answer 2(a)

Corporate Restructuring aims at different things at different times for different companies with prominent objective is to eliminate the disadvantages and combine the advantages. Corporate Restructuring need to optimise in:

(i) Focus core strengths, operational synergy and efficient allocation of managerial capabilities and infrastructure.

(ii) Consolidation and economies of scale by expansion and diversion to exploit extended domestic and global markets.

(iii) Rehabilitation of a sick unit by synergising losses with profits of a healthy units.

(iv) Acquiring constant supply of raw materials and access to scientific research and technological developments.

(v) Capital restructuring with mix of loan to reduce the cost of servicing and improving return on capital employed.

(vi) Improve performance at par with competitors by adopting through radical changes adopting information technology.

Answer 2(b)

A company is required to balance between its debt and equity in its capital structure and the funding of the resulting deficit. Neither of the two is a good option. A company is said to be over- capitalized, if its earnings are not sufficient to justify a fair return on the amount of share capital and debentures that have been issued.

A company is said to be under-capitalized if the owned capital of the business is much less than the total borrowed capital. In this case the business is dependent more upon borrowed capital.

Hence we can see that both these options are not good. An ideal situation would be fair capitalization or optimum capitalization.

An over-capitalized company can restructure by taking following steps:

(i) Buy-back of own shares.

(ii) Paying back surplus share capital to shareholders.

(iii) Repaying loans to financial institutions, banks, etc.

(iv) Repaying fixed deposits to public, etc.

(v) Redeeming its debentures, bonds, preference shares etc.

An under-capitalized company may restructure its capital by taking one or more of the following corrective steps:

(i) Injecting more capital through public issue, rights issue.

(ii) Resorting to additional borrowings.

(iii) Issuing debentures, bonds, preference shares etc.

(iv) Inviting and accepting fixed deposits from directors, their relatives etc.

Answer 2(c)

Section 46 of Competition Act, 2002 and the Competition Commission of India (Lesser Penalty) Regulations, 2009 empowers Competition Commission of India (CCI) to impose lesser penalties on an entity making a *"vital disclosure"* with evidence; or in subsequent leniency applications, provide *'significant added value'* to the evidence.

Competition Commission of India (CCI), in *Re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans (Suo Moto Case No 03 of 2013)*, granted 75% reduction in penalty for coming forward.

With Competition Commission of India (Lesser Penalty) Amendment Regulations, 2017, the CCI recognizes more than three applicants for leniency. Subsequent applicants will be eligible for reduction in penalties up to 30% for giving 'significant added value to the evidence already in possession and thus, incentivise companies and individuals to proactively participate in cartel enforcement.

Answer 2A(i)

Although open offer once made cannot be withdrawn yet Regulation 23 of SAST Regulations, 2011 provide certain exceptions. They are as under:

(a) Statutory approvals required for the open offer or for effecting the acquisitions attracting the obligation to make an open offer have been refused subject to such requirement for approvals having been specifically disclosed in the Detailed Public Statement and the letter of offer;

(b) Any condition stipulated in the Share Purchase Agreement attracting the obligation to make the open offer is not met for reasons outside the reasonable control of the acquirer, subject to such conditions having been specifically disclosed in the Detailed Public Statement and the letter of offer;

(c) Sole acquirer being a natural person has died;

(d) Any other circumstances if SEBI merit withdrawal of open offer.

Answer 2A(ii)

While formulating scheme of arrangement for either amalgamation or merger, financial aspects are of prime importance. Aspects that yield benefits such as increase in productivity, improved profitability, and enhanced dividend paying capacity to the resulting company and aimed at :

(a) Pool the resources to achieve economies of production, administrative, financial and marketing management.

(b) Secure the required credit on terms from financial institutions, banks, suppliers, job workers etc.

(c) Reducing cost of production, management, marketing having the combined strength of qualified and competent technical and other personnel.

(d) Research and development activities for product development to ensure a long-lasting, dominant and profit making position in the industry.

(e) Improving productivity and profitability in order to maintain a regular and steady dividend.

(f) Concentrate on the core competence of the merged or the amalgamated company.

(g) Consolidate resource base to improve generation, mobilisation and utilisation of physical, financial, human, knowledge, information and other important tangible and intangible resources.

Answer 2A(iii)

A Depositary Receipt (DR) is a negotiable certificate issued by a bank representing shares in a foreign company traded on a local stock exchange. The depositary receipt gives investors the opportunity to hold shares in the equity of foreign countries and gives them an alternative to trading on an international market. A Depository Receipt is a foreign currency denominated instrument tradeable on a stock exchange generally in Europe or U.S.A.

The major benefit of using Depository Receipt as a means of funding for mergers are

1. The collection of issue proceeds in foreign currency which may be utilized for meeting foreign exchange component of project cost, repayment of foreign currency loans, meeting commitments overseas and similar purposes.
2. The GDR investor does not have to bear any exchange risk as a GDR is denominated in US dollar with equity shares comprised in each GDR denominated in Rupees.
3. The investor reserves the right to exercise his option to convert the GDR and hold the equity shares instead.
4. It facilitates raising of funds of market related prices of minimum cost as compared to a domestic issue and permits raising of further equity on a future date for funding of projects like expansion or diversification through mergers and takeovers etc.
5. It also helps to expand investor base with multiple risk preferences, improves marketability of the issue, and enhances prestige of the company and credibility with international investors.

Question 3

(a) An unlimited company can reduce the share capital of the company in a manner specified in the articles of association of the company without the confirmation of NCLT. Comment.

(b) Whether any exemption notifications have been issued for section 5 and section 6 of Competition Act, 2002 in relation to Banking Companies ?

(c) Proponents of the 'poison pills' argue that poison pills do not prohibit all takeovers but enhance the ability of the Board of directors to bargain for a 'fair price'. Comment.

(d) "External Commercial Borrowings (ECB) framework enables permitted resident entities to borrow from recognised non-resident entities." Comment.

(e) Voluntary Liquidations are dealth under Companies Act, 2013 or the Insolvency & Bankruptcy Code, 2016. Elucidate with relevant provisions. (3 marks each)

Answer 3(a)

Section 66 of the Companies Act, 2013 provides that subject to confirmation by the Tribunal on an application by the company, a company limited by shares or limited by guarantee and having a share capital may, by a special resolution, reduce the share

capital in any manner. Hence we can see that section 66 of the Companies Act, 2013 is applicable to a company limited by shares or a company limited by guarantee and having share capital.

An unlimited company can reduce the share capital in the manner specified in the Articles and Memorandum of the company, as Section 66 of the Companies Act, 2013 is not applicable.

Answer 3(b)

Yes, exemption notification has been issued by the Central Government for Sections 5 and 6 of the Competition Act, 2002 in relation to Banking Companies.

In exercise of the powers conferred by Section 54(a) of the Competition Act, 2002, the Central Government in the public interest vide its Notification S.O. 2828(E) dated 30th August, 2017 exempts, all cases of reconstitution, transfer of the whole or any part thereof and amalgamation of nationalized banks, under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980, from the application of provisions of Sections 5 and 6 of the Competition Act, 2002 for a period of ten years from the date of publication of this notification in the Official Gazette.

Answer 3(c)

The poison pill technique, sometimes also known as a shareholder rights plan, is a form of defense against a potential hostile takeover. It is a technique by which the target company seeks to make itself less desirable to potential acquirers.

A controversial but popular defense mechanism against hostile takeover bids is the creation of securities called “poison pills". These pills provide their holders with special rights exercisable only after a period of time following the occurrence of a triggering event such as a tender offer for the control or the accumulation of a specified percentage of target shares. These rights take several forms but all are difficult and costly to acquire control of the issuer, or the target firm. Poison pills are generally adopted by the Board of Directors without shareholders’ approval but the technique is vulnerable to Court review as such considered enhancing the ability of the Board of Directors to bargain for a "fair price” though takeovers cannot be prevented.

Answer 3(d)

External Commercial Borrowings (ECB) are commercial loans raised by eligible resident entities from recognised non-resident entities confirming to parameters with minimum maturity, permitted and non-permitted end-uses, minimum all-in-cost ceiling, etc. The parameters apply in totality and not on a standalone basis. Reserve Bank of India issued Foreign Exchange Management (Borrowing and Lending) Regulations, 2018 for borrowing and lending between a person resident in India and a person resident outside India. Minimum Average Maturity Period (MAMP) of ECB are 3/5/7/10 years.

ECB framework permits resident entities to borrow from recognised non-resident entities in any form including bank loans, Securitised instruments, buyers' credit, suppliers' credit, Foreign Currency Convertible Bonds (FCCBs), Financial Leases and Foreign Currency Exchangeable Bonds (FCEBs).

Answer 3(e)

Part II of Chapter XX of the Companies Act, 2013 dealing with voluntary winding up has since been deleted by the Insolvency and Bankruptcy Code, 2016 and a separate provision of section 59 has been made in the Insolvency and Bankruptcy Code for dealing with voluntary winding up of corporate persons including companies. This section provides for the initiation of voluntary liquidation proceedings by the corporate debtor which has not defaulted on any debt due to any person A corporate debtor, being a company may choose to be wound up voluntarily under several circumstances including winding up as a result of expiry of period of operation fixed in its constitutional documents or occurrence of an event provided in its constitutional documents for its dissolution.

PART B

Question 4

(a) Normally market based approach is used for the purpose of valuation but there are circumstances that do not suit such an approach especially in case of valuation of shares and securities—justify with your comments. (5 marks)

(b) Bell Ltd. is taking over Ring Ltd. shareholders of Ring Ltd. would get 0.8 shares in Bell Ltd. for every share held in Ring Ltd. Data in respect of both the companies is as given below :

	Bell Ltd.	*Ring Ltd.*
Net Sales (₹ in crore)	*335*	*118*
Profit after Tax (₹ in crore)	*58*	*12*
Number of Shares (in crore)	*12*	*3*
Earning per share (in ₹)	*4.83*	*4*
Market value per share (in ₹)	*30*	*20*
Price Earning Ratio	*6.21*	*5*

Calculate the following in respect of resultant company after merger :

(i) Earnings Per Share;

(ii) Price-Earnings Ratio;

(iii) Market value per share;

(iv) Number of shares; and

(v) Total Market Capitalisation.

Note :

(1) Assume that same financial results continue for the next year.

(2) Present calculations upto 2 dccimals ignoring the rest. (5 marks)

(c) Big Limited is proposed to be merged with Small Limited by means of share exchange. Big Limited has 2,50,000 shares and Small Limited has 1,25,000 shares. Market price of shares of Big Limited and Small Limited is ₹20 and ₹10 respectively. Earnings after tax of companies is:

Big Limited ₹5,00,000 Small Limited ₹1,25,000 Calculate :

(1) EPS and P/E ratio of both the companies before merger.

(2) Exchange Ratio if the EPS of Big Limited remains the same after the merger. *(5 marks)*

Answer 4(a)

Normally, a strategic buyer adopts market based approach for the purpose of valuation. In case the shares in the company are listed in a stock exchange, market price method helps in evaluating the price in the secondary market. However, there are circumstances in which market based approach is neither suitable nor could be adopted. Valuation of a division of a company, if shares are not listed or thinly traded, if the object is to liquidate the company does not suit market based approach. Results will also be erratic if there are significant or unusual fluctuations. At times the valuer ignores the market price, if he is of opinion that the market price is not a fair reflection of the Company's underlying assets or profitability status. Market based approach is not at all suitable in cases of unlisted companies and private companies. Valuation of start-up companies are also beyond market based approach.

Answer 4(b)

Premium available to shareholders of Ring Ltd as per market value of each share in Bell Ltd 0.8 x 30 = 24

Value of each share in Ring Ltd before Merger = $\frac{20}{4}$

Hence Premium

Premium as a percentage 4/20 x 100 = 20%

Number of shares allotted to shareholders of Ring Ltd. 3x0.8 = 2.4 Crores

Number of shares in combined resultant company = 12+2.4 = 14.4 Crores

Combined Profit after Tax = 58 +12 = 70 Crores

(i) Combined EPS (70/14.4) = ₹4.86

(ii) Combined P/E Ratio = 6.21 x (58/70) + 5 x (12/70) = ₹6

(iii) Market Value Per Share i, e., P/E Ratio x EPS or 6 x 4.86 = ₹29.16

(iv) Number of shares in the Resultant Company = 12 + 2.4 = 14.4 Crores

(v) Total Capitalisation of Resultant Company = Market Value Per Share x Number of shares or 29.16 x 14.4 = ₹419.90 Crores

Answer 4(c)

Earning Before Merger

		Big Ltd	*Small Ltd.*
(1)	Earnings After Taxes	5,00,000	1,25,000
	No. of Shares	2,50,000	1,25,000
	Earnings per share (EPS $\frac{\text{Total Earnings}}{\text{No. of Shares}}$	2	1
	Market price per share	20	10
	P/E Ratio $\frac{\text{Market Price}}{\text{EPS}}$	10	10

(2) Exchange Ratio

Total number of shares in the post-merger Company

Total earnings after merger

= 5, 00,000 + 1, 25, 000

= Rs. 6, 25,000

Pre-Merger earnings of Big Ltd. = 2

$$\text{Number of share to be issued} = \frac{\text{Post - Merger Earning}}{\text{Pre Merger EPS of Big Ltd.}}$$

$$= \frac{6,25,000}{2}$$

= 3, 12, 500

Number of shares to be issued = 3, 12,500 - 2, 50,000 = 62,500

Number of existing share of Small Ltd. = 1, 25,000

$$\text{Exchange Ratio} = \frac{62,500}{1,25,000}$$

= 0.50

Thus one share of Big Ltd. will be issued for every two shares of Small Ltd.

Question 5

(a) Brand Valuation is necessary to determine the worth of a company. Why is brand valuation important ? Discuss some methods of valuation of brand.

(5 marks)

(b) What is the meaning of liquidation value ? Explain the process of computation of liquidation value of an enterprise. (5 marks)

(c) XYZ Company Ltd. (XYZ) is acquiring PQR Company Ltd. (POR) . XYZ will pay its 0.5 share to the shareholders of PQR for each share held by them in PQR. The data for the two companies are as given below :

	XYZ	*PQR*
Profit after tax (₹ in lakh)	*150*	*30*
Number of shares (in lakh)	*25*	*8*
Earnings per share (₹)	*6.00*	*3.75*
Market price per share (₹)	*78.00*	*33.75*
Price-earnings ratio	*13*	*9*

Calculate the earnings-per share of the Resultant /amalgamated company. If the price earnings ratio of XYZ falls to 12 after the merger, what would have been the premium received by the shareholders of PQR. How far is the visible (financial) gain or loss to the shareholders of XYZ Ltd. on account of the merger?

Note :

(1) Assume that same financial results continue for the next year.

(2) Present calculations upto 2 decimals ignoring the rest. (5 marks)

Answer 5(a)

Brand valuation is the process used to calculate the value of brands. Strong brands create loyalty, help companies attract and retain talent, drive competitive advantage, and even reduce business risk. Brand valuation is a way to quantify all of these benefits.

There are various ways to calculate the valuation of a Brand:

1. *Cost-Based Brand Valuation*

   The brand is valued using the sum of individual costs or values of brand assets and liabilities. It's the accumulation of the costs that have been incurred to build the brand since inception. Items included when evaluating costs include advertising, promotion expenditures, the cost of campaign creation, licensing and registration costs.

   One drawback of this method is that while costs can be collected and used, the figure doesn't necessarily represent the current value of a brand.

2. *Market-Based Brand valuation*

   This method uses one or more valuation methods by comparing similar brands which have been sold. This method uses comparable market transactions like the specific sale of a brand, comparable company transactions, and/or stock market quotations. Market-based brand valuation is what a brand can be sold for. The brand value using this method is equal to a market transaction price, bid, or offer for identical or reasonably similar brands. In real estate terms, it's like researching the sales prices of similar homes in the same neighbourhood before putting a price on your own home.

3. *Income-Approach Brand Valuation*

   This method is often referred to as the "in-use" approach. It considers the valuation of future net earnings that can be attributed directly to the brand to determine the value of the brand in its current use. The brand value using this method is equal to the present value of income, cash flows, or cost savings actually or hypothetically due to the asset.

Answer 5(b)

Liquidation value is the total worth of a company's physical assets when it goes out of business or if it were to go out of business. Liquidation value is determined by assets such as real estate, fixtures, equipment and inventory. Intangible assets are not included in a company's liquidation value.

Liquidation value is usually lower than book value but greater than salvage value. The assets continue to have value but, due to a limited time frame, must be sold at a loss to book value. Liquidation value does not include intangible assets. Intangible assets include a business's intellectual property, goodwill, and brand recognition. Value investors look at the difference between a company's market capitalization and its going concern value to determine whether the company's stock is currently a good buy.

The liquidation value is calculated as follows:

I. Net Realisable valuation method is generally used in case of liquidation.
II. From the balance sheet of the company calculate the assets and liabilities of the company.
III. The assets have to be valued as if they are individually sold and not as a going concern value.
IV. The intangible assets are not considered for liquidation value Total Assets minus total liabilities constitute the liquidation.
V. Some liabilities which arise on closure should also be considered like retrenchment compensation.
VI. Tax consequences have also to be taken into consideration.
VII. Any distribution to the shareholders of the company on its liquidation, to the extent of accumulated profits of the company is regarded as deemed dividend. Dividend Distribution tax will have to be captured for such valuation.

Answer 5(c)

Combined profit after tax = 150 + 30 = ₹180

Lakh Combined shares = 25 +0.5(8) = ₹29 lakh

EPS = 180/29 = ₹6.21

Market price after merger = Revised P/E * EPS = 12 * 6.21 = ₹74.52

Premium to PQR Shareholder = {0.5 (74.52)-33.75}/33.75 = (37.26-33.75)/33.75 = 0.104 or 10.4%

The merger is not beneficial to XYZ's shareholders because their price falls from ₹78 to ₹74.52 there is a loss of 4.46%.

PART C

Attempt all parts of either Q. No. 6 or Q. No.6A

Question 6

(a) *Insolvency professionals are permitted to take assistance of legal, accounts or other professionals but not supposed to outsource any of his duties or responsibilities under Insolvency and Bankruptcy Code, 2016 and regulations made there-under—Offer your views in light of clarification issued by Insolvency and Bankruptcy Board of India (IBBI).* *(5 marks)*

(b) *What are the modes of recovery which can be used by the recovery officer to recover the debts determined by the Debt Recovery Tribunal under the Recovery of Debts and Bankruptcy Act ?* *(5 marks)*

(c) *"An insolvency professional shall be eligible to be appointed as a liquidator if he, and every partner or director of the insolvency professional entity of which he is a partner or director is independent of the corporate person." In the light of given statement, discuss the eligibility of insolvency professional to be appointed as a liquidator under Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017.* *(5 marks)*

(d) *The UNCITRAL Model Law is not a law in its own right and has no force. It provides a legal text for incorporation into national law. Discuss the circumstances that necessitated the development of a Model Law on cross border insolvency.* *(5 marks)*

OR (Alternate question to Q. No. 6)

Question 6A

(i) *What are the provisions regarding disclaimer of onerous properties by the liquidator under the Companies Act, 2013 ?* *(5 marks)*

(ii) *Insolvency and Bankruptcy Code, 2016 is dependent on adjudication and regulation. While adjudication is dealt by National Company Law Tribunal or Debt Recovery Tribunal, the regulations are framed by the Insolvency and Bankruptcy Board of India (IBBI)— describe in short the role and powers of IBBI as per Code.* *(5 marks)*

(iii) *Discuss the obligations of the Asset Reconstruction Companies regarding modification of security interest and satisfaction of security interest under the SARFAESI Act, 2002.* *(5 marks)*

(iv) *Define the following terms under SARFAESI Act, 2002 :*

- *(a) Securitisation*
- *(b) Secured Creditor*
- *(c) Security Receipt* *(5 marks)*

Answer 6(a)

Insolvency and Bankruptcy Board of India (IBBI) came out with a circular in January 2018 clarifying that an Insolvency Professional (IP) is required to perform certain tasks

under the Code while acting as an Interim Resolution Professional, a Resolution Professional, a Liquidator or a Bankruptcy Trustee for various processes. They shall not outsource any of his duties and responsibilities under the Insolvency and Bankruptcy Code. They shall not require any certificate from another person certifying eligibility of resolution application. Further this was also stated that the insolvency professional shall exercise reasonable care and diligence and take all necessary steps to ensure that the corporate person undergoing any process under the Code complies with the applicable laws.

The Insolvency and Bankruptcy Code read with Insolvency Professional Regulations allow insolvency professional to appoint accountants, legal or other professionals, as may be necessary. IBBI noticed that certain IP are seeking from prospective resolution applicants to submit a certificate of their eligibility. This amounts to outsourcing responsibilities of insolvency professional to another person. The code read with regulation does not require such certification from a third person.

IBBI accordingly prohibited IP from outsourcing otherwise than in the Code and desist from asking for certificate of eligibility of Resolution applicants.

Answer 6(b)

Section 25 of the Recovery of Debts and Bankruptcy Act, 1993 provide the modes of recovery of debts by the Recovery Officer. These are

(a) attachment and sale of the movable or immovable property of the defendant;

(b) taking possession of property over which security interest is over created or any other property of the defendant and appointing receiver for such property and to sell the same

(c) arrest of the defendant and his detention in prison;

(d) appointing a receiver for the management of the movable or immovable properties of the defendant;

(e) Any other mode of recovery as may be prescribed by the Central Government.

Answer 6(c)

According to the Regulation 6(1) Insolvency and Bankruptcy Board of India (Voluntary Liquidation Process) Regulations, 2017, an insolvency professional shall be eligible to be appointed as a liquidator if he, and every partner or director of the insolvency professional entity of which he is a partner or director is independent of the corporate person:

Explanation : A person shall be considered independent of the corporate person, if he

(a) is eligible to be appointed as an independent director on the board of the corporate person under section 149 of the Companies Act, 2013, where the corporate person is a company;

(b) is not a related party of the corporate person; or

(c) has not been an employee or proprietor or a partner

i. of a firm of auditors or secretarial auditors or cost auditors of the corporate person; or

ii. of a legal or a consulting firm, that has or had any transaction with the corporate person contributing ten per cent or more of the gross turnover of such firm, at any time in the last three years.

(2) An insolvency professional shall not be eligible to be appointed as a liquidator if he or the insolvency professional entity of which he is a partner or director is under a restraint order of the Board.

(3) A liquidator shall disclose the existence of any pecuniary or personal relationship with the concerned corporate person or any of its stakeholders as soon as he becomes aware of it, to the Board and the Registrar.

(4) An insolvency professional shall not continue as a liquidator if the insolvency professional entity of which he is a director or partner, or any other partner or director of such insolvency professional entity represents any other stakeholder in the same liquidation.

Answer 6(d)

In order to create and maintain harmony in regulatory aspects of insolvency mechanism across countries the United Nations Commission developed a Model Law on Cross-Border Insolvency. The Model Law is not a law in its own right and has no force. It provides a legal text for incorporation into national law.

The following circumstances necessitated the harmonization of legislations across nations with reference to cross-border insolvency:

1. Continuing global expansion of trade and investment.
2. Increasing incidences of cross-border insolvency due to integration of trade across countries.
3. National insolvency laws of different countries have by and large not kept pace with the trend.
4. Inadequate and inharmonious legal approaches due to differences in regulatory platform across countries that hampers the rescue of financially troubled businesses and impede the protection of the assets of the insolvent debtor against dissipation.

Answer 6A(i)

Section 333 of the Companies Act, 2013 deals with disclaimer of onerous property and it provides that:

1. Where any part of the property of a company which is being wound up consists of —
   (a) land of any tenure, burdened with onerous covenants; or
   (b) shares or stocks in companies; or
   (c) any other property which is not saleable or is not readily saleable by reason of the possessor thereof being bound either to the performance of any onerous act or to the payment of any sum of money; or
   (d) Unprofitable contracts.

2. The Company Liquidator may disclaim the onerous property in accordance with the provisions of this section, notwithstanding that he has

   (a) endeavoured to sell such property; or

   (b) taken possession of such property; or

   (c) exercised any act of ownership in relation such property; or

   (d) done anything in pursuance of any contract.

3. The conditions applicable for disclaiming the onerous property by the liquidator are:

   (a) The Company Liquidator may disclaim the onerous property within 12 months after the commencement of the winding up or such extended period as may be allowed by the Tribunal.

   (b) If the Company Liquidator had not become aware of the existence of any onerous property within 1 month from the, commencement of the winding up, the power of disclaiming the property may be exercised at any time within 12 months after he has become aware thereof or such extended period as may be allowed by the Tribunal.

Answer 6A(ii)

Section 240 of the Insolvency and Bankruptcy Code enables Insolvency and Bankruptcy Board of India (IBBI) to formulate and enforce regulations broadly covering the following matters:

1. Regulating all matters related to insolvency and bankruptcy process.
2. Setting out eligibility requirements of insolvency intermediaries i.e., Insolvency Professionals, Insolvency Professional Agencies and Information Utilities.
3. Regulating entry, registration and exit of insolvency intermediaries.
4. Making model bye laws for Insolvency Professional Agencies.
5. Setting out regulatory standards for Insolvency Professionals.
6. Specifying the manners in which information utilities can collect and store data.

Similarly, powers and functions of IBBI are detailed in Section 196 of the of the Insolvency and Bankruptcy Code empowering the IBBI with same powers as vested in a civil court under Code of Civil Procedure 1908 (CPC) for discovery, summoning, examination of witnesses or documents.

Answer 6A(iii)

Modification of security interest registered under the SARFAESI Act 2002

Section 24 of the SARFAESI Act, 2002 provides that whenever the terms or conditions, or the extent or operation, of any security interest registered under this Chapter are or is modified, it shall be the duty of the asset reconstruction company or the secured creditor, as the case may be, to send to the Central Registrar, the particulars

of such modification, and the provisions of this Chapter as to registration of a security interest shall apply to such modification of such security interest.

Satisfaction of security interest registered under the SARFAESI Act, 2002 :

Section 25 of the Act deals with the Asset Reconstruction Company or secured creditor to report satisfaction of security interest.

(1) The asset reconstruction company or the secured creditor as the case may be, shall give intimation to the Central Registrar of the payment or satisfaction in full, of any security interest relating to the asset reconstruction company or the secured creditor and requiring registration under this Chapter, within thirty days from the date of such payment or satisfaction.

(2) On receipt of intimation the Central Registrar shall order that a memorandum of satisfaction shall be entered in the Central Register.

(3) If the concerned borrower gives an intimation to the Central.

(4) Registrar for not recording the payment or satisfaction, the Central Registrar shall on receipt of such intimation, cause a notice to be sent to the asset reconstruction company or the secured creditor calling upon it to show cause within a time not exceeding fourteen days specified in such notice, as to why payment or satisfaction should not be recorded as intimated to the Central Registrar.

(5) If no cause is shown, the Central Registrar shall order that a memorandum of satisfaction shall be entered in the Central Register.

(6) If cause is shown, the Central Registrar shall record a note to that effect in the Central Register, and shall inform the borrower that he has done so.

Answer 6A(iv)

(a) According to Section 2(1)(z)of the SARFAESI Act, 2002, Securitisation means acquisition of financial assets by any asset reconstruction company from any originator, whether by raising of funds by such asset reconstruction company from qualified buyers by issue of security receipts representing undivided interest in such financial assets or otherwise

(b) According to Section 2(1)(zd)of the SARFAESI Act, 2002, Secured Creditor means :

  (i) any bank or financial institution or any consortium or group of banks or financial institutions holding any right, title or interest upon any tangible asset or intangible asset as specified in clause (1)

  (ii) debenture trustee appointed by any bank or financial institution; or

  (iii) an asset reconstruction company whether acting as such or managing a trust setup by such asset reconstruction company for the securitisation or reconstruction, as the case may be; or

  (iv) debenture trustee registered with the Board appointed by any company for secured debt securities; or

(v) any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created by any borrower for due repayment of any financial assistance.

(c) According to Section 2(1)(zg) of the SARFAESI Act, 2002, Security Receipt means a receipt or other security, issued by a asset reconstruction company to any qualified buyer pursuant to a scheme, evidencing the purchase or acquisition by the holder thereof, of an undivided right, title or interest in the financial asset involved in securitization.

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