GUIDELINE ANSWERS

PROFESSIONAL PROGRAMME

DECEMBER 2023

MODULE 2

THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
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(Under the jurisdiction of Ministry of Corporate Affairs)
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These answers have been written by competent persons and the Institute hope that the **GUIDELINE ANSWERS** will assist the students in preparing for the Institute's examinations. It is, however, to be noted that the answers are to be treated as model answers and not as exhaustive and the Institute is not in any way responsible for the correctness or otherwise of the answers compiled and published herein.

The Guideline Answers contain the information based on the Laws/Rules applicable at the time of preparation. However, students are expected to be updated with the applicable amendments which are as follows:

CS Examinations	**Applicability of Amendments to Laws**
December Session	upto 31 May of that Calender year
June Session	upto 30 November of previous Calender Year

C O N T E N T S

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PROFESSIONAL PROGRAMME EXAMINATION

DECEMBER 2023

SECRETARIAL AUDIT, COMPLIANCE MANAGEMENT AND DUE DILIGENCE

Time allowed : 3 hours *Maximum marks : 100*

Total number of questions : 6

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

PART I

Question 1

(a) X & Y LLP had a turnover of ₹10 crore and the total obligations of contribution of partners was ₹40 lakh. The Designated/Managing Partner is of the view that the company does not require a company secretary to certify the Annual Return of the LLP, so the e-form need not be certified by a Company Secretary in Practice. Citing the relevant provisions, state whether the Managing/Designated Partner's view is correct.

(5 marks)

(b) Tarun got the membership on 30th June, 2014 as an Associates Member as well as the Certificate of Practice of the Institute of Company Secretaries of India. He has passed the Insolvency professional examination on 1st January, 2023. On 31st March, 2023, he has applied for membership of Insolvency Professional. Citing the relevant provisions, examine whether he can do so ? Explain the role of a Company Secretary as an Insolvency professional.

(5 marks)

(c) There are some charges on the properties which are created/acquired by a foreign company, FT Ltd. Whether this transaction requires registration of charges? Give any two examples of the transactions requiring registration of charges. Also specify the Form No. in which the register of charges is to be kept at the register office.

(5 marks)

(d) The Board of Directors (BOD) of CTZ Ltd. thinks that the documents, register, index, agreement, memorandum & minutes maintained by the company in electronic form, after getting it dated and signed digitally are capable of being edited or altered subsequently under their powers. Is the contention of BOD of CTZ Ltd. correct ? Explaining the meaning of document and records, elucidate the manner in which the records in electronic form should be maintained as per the provisions contained in the Companies Act, 2013.

(5 marks)

Answer 1(a)

As per the section 35 of the Limited Liability Partnership Act, 2008 (LLP Act), Annual Return (Form 11) is required to be filed under Rule 25 of LLP Rules, 2009. Further, Rule 25(2) states that the annual return of LLP having turnover upto five crore rupees during

the corresponding financial year or contribution upto fifty lakh rupees shall be accompanied with a certificate from a designated partner, other than the signatory to the annual return, to the effect that annual return contains true and correct information. In all other cases, the annual return shall be accompanied with a certificate from a Company Secretary in practice to the effect that he has verified the particulars from the books and records of the limited liability partnership and found them to be true and correct.

In the given problem X & Y LLP had a turnover of Rs. 10 crore which according to the above provision exceeds Rs. 5 crore and the total obligations of contribution of partners of the LLP is Rs. 40 lakh, which is less than Rs. 50 lakh. According to the above provisions, even if either of the condition is satisfied, it will be deemed to be fulfilled.

The Designated/Managing Partner's contention is wrong that the company does not require a Company Secretary to certify the Annual Return of LLP and that the e-form need not be certified by a Company Secretary in Practice.

So, X & Y LLP will require a Company Secretary in Practice to certify the Annual Return and the e-Form of the LLP.

Answer 1(b)

As per Regulation 5 of Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016, an individual shall be eligible for registration, if he –

(a) has passed the Limited Insolvency Examination within twelve months before the date of his application for enrolment with the insolvency professional agency;

(b) has completed a pre-registration educational course within twelve months from the date of payment of non-refundable application fee under regulation 6, as may be required by the Board, from an insolvency professional agency after his enrolment as a professional member; and

(c) has-

(i) successfully completed the National Insolvency Programme, as may be approved by the Board;

(ii) successfully completed the Post Graduate Insolvency Programme, as may approved by the Board;

(iii) experience of –

a) ten years in the field of law, after receiving a Bachelor's degree in law;

b) ten years in management, after receiving a Master's degree in Management or two-year full time Post Graduate Diploma in Management; or

c) fifteen years in management, after receiving a Bachelor's degree, from a university established or recognised by law or an Institute approved by All India Council of Technical Education; or

(iv) ten years' of experience as –

a) chartered accountant registered as a member of the Institute of Chartered Accountants of India,

b) company secretary registered as a member of the Institute of Company Secretaries of India,

c) cost accountant registered as a member of the Institute of Cost Accountants of India, or

d) advocate enrolled with the Bar Council.

Therefore, Tarun cannot apply for membership as Insolvency Professional as he is not having the required experience of ten years.

Role of Company Secretary as an Insolvency Professional:

Company Secretaries having passed necessary examination, possessing prescribed number of years of experience, enrolled with an insolvency professional agency and registered with Insolvency and Bankruptcy Board of India (IBBI) as an insolvency professional, can take up matters relating to corporate insolvencyresolution process as Interim Resolution Professionals/Resolution Professionals, as well as also take up voluntary liquidation cases. They can also act as authorized representatives for a class of creditors in a meeting of the Committee of Creditors in a resolution process.

Answer 1(c)

Section 77(1) of Companies Act, 2013 states that it shall be the duty of every company creating a charge within or outside India, on its property or assets or any of its undertakings, whether tangible or otherwise, and situated in or outside India, to register the particulars of the charge signed by the company and the charge-holder together with the instruments, if any, creating such charge in Form CHG-1, on payment of such fees and in such manner as may be prescribed, with the Registrar within thirty days of its creation.

The provisions of section 77 relating to registration of charges shall, so far as may be, apply to—

a. a company acquiring any property subject to a charge within the meaning of that section; or

b. any modification in the terms or conditions or the extent or operation of any charge registered under that section.

Yes, every company creating a charge or charges on properties which are created or acquired by any foreign company has to register the particulars of the charge signed by the company and the charge-holder together with the instrument.

The examples of such transactions requiring charge registration are as follows:

— The company is acquiring any property or assets whether tangible or not, which are subject to any charge;

— A charge is created within or outside India, on any of its undertakings;

— There is any modification in the terms or conditions or the extent or operation of any charge already registered;

— There are charges on properties which are created or acquired by any foreign company.

Every company has to keep at its registered office a register of charges in Form CHG-7, which shall include therein all charges and floating charges affecting any property or assets of the company or any of its undertakings.

Answer 1(d)

Section 120 of the Companies Act. 2013 read with Rule 27 of the Companies (Management and Administration) Rule, 2014 provides for maintenance of documents in electronic form. Section 2(36) of the said Act relates to the definition of "document" which includes summons, notice, requisition, order, declaration, form and register, whether issued, sent or kept in pursuance of Companies Act or under any other law for the time being in force or otherwise, maintained on paper or in electronic form.

As per explanation to rule 27 the Companies (Management and Administration) Rule, 2014 "records" means any register, index, agreement, memorandum, minutes or any other document required by the Act or the Rules made there under to be kept by a company.

Therefore, such documents and records can also be maintained in electronic form.

However, as per rule 27(2) the records in electronic form shall be maintained in such manner as the Board of directors of the company may think fit,

Provided that -

(a) the records are maintained in the same formats and in accordance with all other requirements as provided in the Act or the rules made there under;

(b) the information as required under the provisions of the Act or the rules made there under should be adequately recorded for future reference;

(c) the records must be capable of being readable, retrievable and reproducible in printed form;

(d) the records shall be capable of being updated, according to the provisions of the Act or the rules made there under;

(e) the records, once dated and signed digitally, shall not be capable of being edited or altered;

(f) the records shall be capable of being updated, according to the provisions of the Act or the rules made thereunder, and the date of updating shall be capable of being recorded on every updating.

The contention of Board of Directors is wrong. The records once dated and signed digitally wherever it is required under the provisions of the Act or the Rules made thereunder, shall not be capable of being edited or altered subsequently under Rule 27(2)(e) of the Companies (Management and Administration) Rule, 2014.

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

Question 2

(a) State the relevant provisions in each of the following situations as per to the Securities Exchange Board of India (Listing Obligations and Disclosure

Requirements) [SEBI (LODR)] (Third Amendment) Regulations, 2021 vide SEBI notification dated 31st August 2021 effective from 1st January 2022.

(i) Time Period required for approval of shareholders for the appointment of a person on the Board of Directors for a listed entity.

(ii) Independent Directors to be included in the composition of nomination and remuneration committee.

(iii) App*roval required for the appointment, re-appointment or removal of an independent director of a listed entity.*

(iv) Extension of number of companies for the requirement of undertaking directors and officers insurance.

(v) Period of elapse required for the appointment of independent director who resigns from a listed entity.

(5 marks)

(b) "The strength of a folder and file naming convention under documents in electronic form is dependent on the proposed naming structure and the quality and quantity of the data elements chosen to build it." With reference to this, correct each of the following statements, specifying the basic rules that could serve as a basic guideline in structuring folder and file naming, along with the reason associated with it :

(i) C:/Crescent Milky Way/Financial Year/2022-23/Annual Return/Form MGT-7.doc

(ii) Rose Merry TPS 8312 9 POLICY 2022 12 22. pdf II White Paper Structured file naming strategy.doc

(2+3=5 marks)

(c) SS Ltd. wants to appoint Pai as a Technical Director of the company. Pai has requested for a search report before becoming the Director of SS Ltd. in order to know more details of the company. In the meantime, SS Ltd. approached a bank for a loan/credit facility and the bank has asked for a search report. Whether the search report required for above two purposes is same ? Elaborate each case citing the scope of search report.

(5 marks)

(d) Explain the three R's characteristics of Enhanced Due Diligence (EDD) in KYC along with the meaning of EDD.

(5 marks)

OR (Alternate Question to Q. No. 2)

Question 2A

(i) LPK Ltd. alleged that the Good Corporate Governance demands compliances level that match the intentions of legislature, expectations of stakeholders and requirements of regulators. Is the contention of LPK Ltd. correct ? Explain the categories of compliances with examples. Also state the relation between the categories of compliances.

(5 marks)

(ii) You as a Company Secretary in Practice, are asked by your new client FFT Ltd. for restoration of ACTIVE non-Compliant company to the ACTIVE Compliant company in the records of Registrar of companies. Explain the provisions of ACTIVE Compliant companies indicating :

(a) Requirement of filling e-Form ACTIVE.

(b) Exclusions by reason of non-compliance.

(c) Restoration of status as ACTIVE COMPLIANT company, if FFT Ltd. files e-Form ACTIVE, on 26th June, 2022.

(1+2+2=5 marks)

(iii) S, a director of VCT Ltd. wants to know from you as an expert of Company Law for consequences for non-filing of Annual Return of the Company. Explain the provisions of the Companies Act, 2013 from the company's point of view.

(5 marks)

(iv) You are asked as a Company Secretary in whole time employment by the Chief Finance Officer of your company, PK Food Ltd., to list out the specific laws applicable to PK Food Ltd. engaged in food processing industry. List-out any ten laws in this regard.

(5 marks)

Answer 2(a)

SEBI (Listing Obligations and Disclosure Requirements) (Third Amendment) Regulations, 2021 vide (SEBI notification no. No. SEBI/LAD-NRO/GN/202J /35 dated 3rd August, 2021)

SEBI vide its notification dated August 03, 2021, amended the provisions of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, came into force on 1st January, 2022.

The amendments and new insertions inter alia include the following for the given situations:

(i) The listed entity shall ensure that approval of shareholders for appointment of a person on the Board of Directors is taken at the next general meeting or within a time period of three months from the date of appointment, whichever is earlier. [Regulation 17(lC)]- New Insertion.

(ii) The composition of Nomination and Remuneration committee shall include at least two-thirds of the directors shall be independent directors where earlier it was fifty percent and earlier in case of a listed entity having outstanding SR equity shares, two thirds of the nomination and remuneration committee shall comprise of independent directors, this has been omitted by above amendment. [Regulation 19(1)(c)]

(iii) The appointment, re-appointment or removal of an independent director of a listed entity, shall be subject to the approval of shareholders by way of a special resolution. [Regulation 25(2A)]- New Insertion]

(iv) The requirement of undertaking Directors and Officers insurance has been

extended to the top 1000 listed companies with effect from January 01, 2022. [Regulation 25(10)]

(v) No independent director, who resigns from a listed entity, shall be appointed as an executive / whole time director on the board of the listed entity, its holding, subsidiary or associate company or on the board of a company belonging to its promoter group, unless a period of one year has elapsed front the date of resignation as an independent director. [Regulation 25(11)]-New Insertion.

Answer 2(b)

(i) **The correct statement** : C:/CMW/FY/22-23/AR/MGT-7.doc

OR (Alternate Answer)

C:/CMW/FY/22-23/AR/MGT-7.pdf

The Rule associated with it : Avoid extra-long folder names and complex hierarchical structures but use information- rich file names instead.

The Reason associated with it : Complex hierarchical folder structures require extra browsing at time of storage and at the time of file retrieval. By having all the essential information concisely in the file name itself, both the search and identification of the file is streamlined and more precise.

(ii) **The correct statement** : Rose-Merry_TPS_8312- 9_POLICY_2022-12-22.pdf II WhitePaper_Structured File Naming Strategy.doc

The Rule associated with it : Use the hyphen (-) to delimit words within an element or capitalize the first letter of each word within an element and the underscore (_) as element delimiter.

The Reason associated with : Spaces are poor visual delimiters and some search tools do not work with spaces. The hyphen (-) is a common word delimiter. Alternatively, capitalizing the words within an element is an efficient method of differentiating words but is harder to read. And the underscore (_) is a quasi-standard for field delimiting and is the most visually ergonomic character. Some search tools do not work with spaces and should be especially avoided for internet files. Other characters may be interesting but visually confusing and awkward.

Answer 2(c)

No, separate search report is required for each of the case as the contents of the search report varies depending upon the purpose/requirement by the entity.

The scope of Search and Status report depends upon the requirements of the Bank/ Financial/ Institution/Lender/ Investor concerned. A Search and Status report prepared by a Company Secretary in Practice helps Banks/ Financial Institutions/Lenders/ Investors to take conscious decision regarding the quantum of loan/ credit facility to be sanctioned and investment to be made. It also helps in taking an informed and speedy decision assuring the credit- worthiness or otherwise of the company.

Search and Status Report has been explained for the following cases:

1. **By Banks:** Search and Status Report are basic tools for banks to know the

viability of their customer who approach the bank for Cash Credit Limits. Term Loans or otherwise. The sole motto of banks is to provide loans against interest. Hence, knowing the current position of the assets being pledged by the companies become important and the only way to know whether such property is already pledged to some other bank or not is the Search Report. The following basic information about the existing loans taken by the Company is given by the Company Secretary through such reports:

i. The date of loan taken by the company and the charge created in such respect;

ii. The name and address of the charge holder's;

iii. The type of charge i. e. whether joint charge or consortium charge;

iv. The amount of loan;

v. The property charged / pledged against such loan;

vi. The terms and conditions of such loan i.e. rate of interest, terms of repayment, margin money and extent of operation.

2. **By Director** : An individual before becoming the Director of the Company may get the Search Report prepared from a Professional for the following reasons:

i. To know the present directors of the company;

ii. To know the assets and liabilities of the company;

iii. To know the complete history as per ROC records since incorporation.

Answer 2(d)

Meaning of Enhanced Due Diligence : It is a rigorous and robust process of investigation over and above (KYC) procedures, that seeks with reasonable assurance to verify and validate the customers identity; understand and test the customers profile; business and account activity; identify relevant adverse information and risk assess the potential for money laundering and/or terrorist financing to support actionable decisions to mitigate against financial, regulatory and reputational risk and ensure regulatory compliance.

Three R's Characteristics of Enhanced Due Diligence in KYC:

1. *Rigorous and robust* : Generally, this means consistent, thorough and accurate. The process must be documented and available for inspection by regulators. The process must be SMART (Specific, Measurable, Achievable, Re1eivant and Time bound), scalable and proportionate to the risk and resources. A Ball workflow system ensuring that the KYC process and procedures are defined, repeatable and measurable is recommended.

2. *Reasonable Assurance* : Reasonableness depends upon factors including jurisdiction, risk and resources. For sanction matches it depends upon information provided by regulators. In all cases the suggested standard is to the civil standard of proof i.e. on the balance of probability.

3. *Relevant adverse information* : Information obtained from any source, including the Internet, free and subscription databases and the media which is directly or indirectly indicative of involvement in money laundering, terrorist financing or predicate offenses.

Answer 2A(i)

Yes, Good Corporate Governance demands compliances levels that match the intentions of legislature, expectations of stakeholders and requirements of regulators.

The compliances, however are generally found to fall in three categories:

i.e. Apparent Compliances, Adequate Compliances and Absolute Compliances.

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.

Adequate compliance is compliance in letter. The aspects specified in law are complied in letters, without getting into the spirit of the law, example box ticking practices.

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's democracy as prescribed by law. When a company complies with law in its spirit it gains public confidence as well. For example, a company which 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. It 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. It has achieved trust of stakeholders by having a strategic balance between wealth and welfare.

The relation between apparent, adequate and absolute compliance can be shown as follows:

Absolute Compliance = Adequate Compliance X Apparent Compliance

Answer 2A(ii)

(a) Requirement of Filing e-Form ACTIVE : Rule 25A(1) of the Companies (Incorporation) Rules, 20l4 provides that every company incorporated on or before the 3st 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.

(b) Exclusions by reason of non-compliance : Proviso 1 to Rule 25A(1) of the Companies (Incorporation) Rules, 20l4 states that the company which has not filed its due financial statements under Section 137 or due annual returns under Section 92 or both with the Registrar are restricted front filing e-Form-ACTIVE, unless such company is under management dispute and the Registrar has recorded the same on the register.

(c) Restoration of Status : Rule 25A(2) of the Companies (Incorporation) Rules, 20l4 states that 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". The FFT Ltd. is required to pay fee of ten thousand rupees (as the company filed e-Form ACTIVE on 26th June, 2022 in the given case).

Answer 2A(iii)

Consequences for non-filing of Annual Return

For the Company

- **Penalty** : If any company fails to file its annual return, before the expiry of the period specified, such company and its every officer who is in default shall be liable to a penalty of ten thousand rupees and in case of continuing failure, with further penalty of one hundred rupees for each day during which such failure continues, subject to a maximum of two lakh rupees in case of a company and fifty thousand rupees in case of an officer who is in default. [Section 92(5)]

  Further, notwithstanding anything contained in the Companies Act, 2013, if penalty is payable for non-compliance of any of the provisions of this Act by a One Person Company, small company, start-up company or Producer Company, or by any of its officer in default, or any other person in respect of such company, then such company, its officer in default or any other person, as the case may be, shall be liable to a penalty which shall not be more than one-half of the penalty specified in such provisions subject to a maximum of two lakh rupees in case of a company and one lakh rupees in case of an officer who is in default or any other person, as the case may be. (Section 446B)

- **Winding up** : If the Company has defaulted in filing Annual Returns for the immediately preceding five financial years, the Company may be wound up by the Tribunal. (Section 271)

- **Inactive status** : If the Company has not filed its Annual Return for last two financial years. it will be termed as 'inactive company". [Section 455(1)]

- **Dormant status** : If the Company has not filed its Annual Return for two financial years consecutively, the Registrar shall issue notice to the Company and enter its name in the Register of Dormant Companies. [Section 455(4)]

- **Compounding of Offences** : Provisions and procedure for compounding of offences, which are punishable under Companies Act, 2013 are stipulated under Section 441.

Under section 441 of the Companies Act, 2013, any offence punishable under this Act (whether committed by a company or any officer thereof) not being an offence punishable with imprisonment only or punishable with imprisonment and also with fine, may, either before or after the institution of any prosecution, be compounded by –

(a) The Tribunal; or

(b) Where the maximum amount of fine which may be imposed for such offence

does not exceed Rs. 25 lakh by the Regional Director or any Officer authorized by the Central Government.

Answer 2A(iv)

Specific Laws applicable to the food processing industry includes:

- The Essential Commodities Act, 1955
- The Export Quality Control and Inspection Act, 1963
- The National Food Security Act, 2013
- The Food Safety & Standard Act, 2006
- The Food Safety and Standards Rules, 2011
- The Food Safety and Standards (Packaging and Labelling) Regulations, 2011
- The Food Safety and Standards (Licensing and Registration of Food Businesses) Regulations, 2011
- The Food Safety and Standards (Prohibition and Restrictions on Sales) Regulations, 2011
- The Food Safety and Standards (Food Products Standards and Food Additives) Regulations, 2011
- The Food Safety and Standards (Contaminants, Toxins and Residues) Regulations, 2011
- The Meat Food Products Order, 1973
- The Meat and Meat Product Order, 1992 (MMPO)
- The Indian Fisheries Act 1897 and Amendments
- The Fruit Products Order, 1955
- The Vegetables Product Order, 1967 (VPO)
- The Vegetable Oil Products (Control) Order, 1947
- The Edible Oils Packaging (Regulation) Order, 1998
- The Solvent Extracted Oil, De Oiled Meal and Edible Flour (Control) Order, 1967
- The Milk and Milk Products Order, 1992
- Respective State Food Laws

PART II

Question 3

(a) FDF Company, an unlisted public company had paid-up share capital of ₹51 crore and turnover of ₹150 crore during the preceding Financial Year (FY) 2022-23. The company had outstanding loans and borrowings of ₹100 crore &

outstanding deposits of ₹25 crore on 31st March, 2023. The company didn't appoint the internal auditor saying that the loans and borrowings & deposits were not outstanding during the preceding full previous year, but they were outstanding only for one day that too on the last day of the FY i.e. on 31st March, 2023. Was the stand of the company correct ? You as a Company Secretary in Practice, are asked to examine the applicability of the appointment of internal auditor considering the provisions of the Companies Act, 2013.

(5 marks)

(b) Answer each of the following as per the amended rules i.e. Clarification on spending of CSR funds for "Har Ghar Tiranga" campaign (MCA General Circular No. 08/2022 dated 26th July, 2022) and the Companies (Corporate Social Responsibility Policy) Amendment rules, 2022 (MCA notification no. G.S.R.715(E) dated 20th September, 2022) :

(i) If the total Corporate Social Responsibility (CSR) expenditure done by a company in previous Financial Year (FY) 2022-23 is ₹30 crore, then how much amount shall the company undertaking impact assessment may book towards CSR for the FY 2022-23.

(ii) Give a clarification on spending of CSR funds for "Har Ghar Tiranga" Campaign.

(iii) What should the company do if there are any particular funds in their "Unspent Corporate Social Responsibility Account".

(iv) What are the information to be provided by all company's in the new format for annual report on CSR activities ?

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

(c) P, an auditor of SPH Ltd. had conducted the audit for the previous period and is requested to conduct the audit for subsequent period as well. The period of engagement of the audit has not expired and there are no revised terms. So, it is assumed that fresh audit engagement letter will not be required. Is it correct for the recurring audit engagement ? Specify the situations when the audit engagement letter will be required. Explain the criteria for declining/withdrawing for an audit engagement.

(5 marks)

Answer 3(a)

Under section 138 of the Companies Act, 2013 read with rule 13 of the Companies (Accounts) Rules, 2014 every unlisted public company having—

i. Paid up share capital of Rs. 50 crore or more during the preceding financial year: or

ii. Turnover of Rs. 200 or more during the preceding financial year; or

iii. Outstanding loans and borrowings from banks or public financial institutions exceeding Rs. 100 crore or more at any point of time during the preceding financial year: or

iv. Outstanding deposits of Rs. 25 crore or more at any point of time during the preceding financial year

shall appoint an internal auditor.

In the given question:

Paid up Capital is Rs. 51 crore which is more than Rs. 50 crore during the preceding financial year;

Turnover is of Rs. 150 crore which is less than Rs. 200 crore during the preceding financial year; and

Outstanding loans and borrowing of Rs. 100 Crore and outstanding deposits of Rs. 25 crore as on 31st March, 2023.

As Rule 13(1)(b)(iii) & Rule 13(1)(b)(iv) states that outstanding loans and borrowings and outstanding deposits exceeding the certain limit at any point of time during the preceding Financial year requires to comply with provisions of internal audit. Even though the loans and borrowings & deposits were not outstanding during the preceding full previous year and were outstanding only for one day that too on the last day of the F.Y. i.e. on 31st March 2023, the conditions mentioned at (iii) and (iv) are satisfied, as the said conditions refers to "at any point of time during the preceding financial year".

As the conditions specified in (i), (iii) and (iv) mentioned above are satisfied, FDF Company has to appoint an internal auditor.

Answer 3(b)

(i) As per rule 8 of the Companies (Corporate Social Responsibility Policy) Rules, 2014, the Amendment provides that the cost of impact assessments, which can be considered as CSR spending, shall not be greater than 2% of all CSR expenditures for the applicable financial year or Rs. 50 lakh, whichever is higher.

Therefore if the total CSR expenditure done by a Company in Previous Financial Year 2022-23 is Rs. 30 crore, then the amount the Company undertaking impact assessment may book towards Corporate Social Responsibility for the financial year 2022-23 shall be 2% of Rs. 30 Crore= Rs. 60 lakh or Rs. 50 lakh whichever is higher i.e. the CSR spending can be up to Rs. 60 lakh.

(ii) As per circular No. 08/2022 dated 26.07.2022 'Har Ghar Tiranga' a campaign under the aegis of Azadi Ka Amrit Mahotsav, is aimed to invoke the feeling of patriotism in the hearts of the people and to promote awareness about the Indian National Flag. In this regard. it is clarified that spending of CSR funds for the activities related to this campaign, such as mass scale production and supply of the National Flag, outreach and amplification efforts and other related activities, are eligible CSR activities under item no. (ii) of Schedule VII of the Companies Act, 2013 pertaining to promotion of education relating to culture. The companies may undertake the aforesaid activities, subject to fulfillment of the Companies (CSR Policy) Rules, 2014 and related circulars/ clarifications issued by the Ministry thereof, front time to time.

(iii) According to the amendment, proviso to rule 3(1) of the Companies (Corporate Social Responsibility Policy) Rules, 2014 has been inserted stating that, a company having any amount in its Unspent Corporate Social Responsibility Account as per section 135(6) shall constitute a CSR Committee and comply with the provisions contained in sub — sections (2) to (6) of the said section."

(iv) The Amendment also provide for a new format for the annual report on CSR activities. All companies are required to provide the information in the annual report with respect to brief explanation:

- A brief outline of the company's CSR Policy, including overview of projects or programs proposed to be undertaken and a reference to the web-link to the CSR Policy and projects or programs;
- The Composition of the CSR Committee;
- Average net profit of the company for last three financial years;
- Prescribed CSR Expenditure;
- Details of CSR spent during the financial year;
- A responsibility statement of the CSR Committee that the implementation and monitoring of CSR Policy, is in compliance with CSR objectives and Policy of the company.

Answer 3(c)

The audit engagement letter should be reviewed every year to ensure that it is up to date but does not need to be reissued every year unless there are changes to the terms of the engagement. The auditor shall obtain a new engagement letter if the scope or context of the assignment changes after initial appointment.

The audit engagement letter will be required in the following situations:

New Audit Engagement — Covers an audit being conducted first time and therefore the appointment of the Auditor is an initial appointment. It will also cover the situations is here the audit for the previous period was conducted by another Auditor.

Changes in terms of Audit Engagement — Whenever there is a change in the terms of Audit Engagement in the middle of an ongoing audit, the Auditor shall adhere to the Standard and initiate a revised Engagement Letter in terms of this Standard.

Recurring Audit Engagement — Covers the situation where the Auditor had conducted the audit for the previous period and is requested to conduct the audit for the subsequent period as well. In such a case, the Auditor should obtain fresh Audit Engagement Letter if the period of engagement has expired, including revised terms if the circumstances so require Auditor shall adhere to the Standard even if the Audit Engagement is a continuing one.

Conclusion : As there were no revised terms and also the period of engagement has not expired, it is correct to state that for the recurring audit engagement fresh audit engagement letter will not be required.

The criteria for declining and withdrawing for an engagement are as follows:

Based on the evaluation of client information and the following factors, the auditor should determine and document the conditions beyond which it would be prudent to decline, or withdraw from an engagement:

(a) Client's status/information that is likely to impact adversely on the independence of the firm;

(b) Ability of the firm to provide appropriate service to the client, considering needs nor technical skills, knowledge of the industry and personnel;

(c) Consider circumstances which would cause the firm to regard the engagement as one requiring special attention or presenting unusual risks.

Question 4

(a) Jai is a Fellow Member of the Institute of Company Secretaries of India and he was convicted by a competent court of' USA. He is applying for Peer Reviewer. Advise him as an expert for empanelment of peer reviewers whether he is eligible to apply for Peer reviewer.

(b) Explain various types of civil quasi-judicial actions/proceedings, which the Securities and Exchange Board of India (SEBI) is empowered to initiate to protect the interest of investors and to regulate the securities market.

(c) What are the main purposes for an interview in context of an audit ? Can all these purposes be used together at the same time ? Briefly discuss.

(d) Evidence gathering is an iterative process. Comment.

(e) J is a Practicing Company Secretary. He had taken a personal loan of ₹75,00,000 from LKP Ltd. He has used such loan towards purchase of his house which has been mortgaged with LKP Ltd. Due to some financial crisis, J has not been able to repay any amount towards the loan since past 2 years. J has been offered to undertake the Secretarial Audit of LKP Ltd. Can J accept the offer to undertake the Secretarial Audit of LKP Ltd. ? Provide justification in support of your answer.

(3 marks each)

Answer 4(a)

For the purpose to be empaneled as Peer Reviewer, a member of the Institute of Company Secretaries of India shall not have (following disqualifications):

(a) disciplinary action / proceedings pending against him during the past 3 years initiated by the government/ regulatory body/ statutory body;

(b) been found guilty of professional or other misconduct by the Committee of Discipline / Disciplinary Committee, at any time, as the case may be;

(c) been convicted by a Competent Court whether within or outside India of an offence involving moral turpitude and punishable with transportation or imprisonment.

In this case, Jai was convicted by a competent court of USA. Therefore, he is disqualified to be a Peer Reviewer.

Answer 4(b)

Civil quasi-judicial proceedings:

Securities and Exchange Board of India (SEBI) is empowered to initiate three types of civil quasi-judicial actions under governing legislations:

(i) Adjudication proceedings under Chapter VIA of the SEBI Act, 1992 read with the SEBI (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating

Officer) Rules, 1995 (and under the analogous provisions of the Securities Contracts (Regulation) Act, 1956 (SCRA) and Depositories Act and Rules issued thereunder).

As per section 15-I of the SEBI Act, for the purpose of adjudging under sections 15A, 15B, 15C, 15D, 15E, 15EA, 15EB, 15F, 15G, 15H, 15HA and 15HB, the Board may appoint any of its officers not below the rank of a Division Chief to be an adjudicating officer for holding an inquiry in the prescribed manner after giving any person concerned a reasonable opportunity of being heard for the purpose of imposing any penalty.

(ii) Enquiry Proceedings under Chapter V of SEBI (Intermediaries) Regulations, 2008 may inter alia result in suspension/ cancellation of certificate of registration of the registered intermediary.

(iii) Proceedings before the Board: The power of issuing directions including under Section 11, 11B, 11D of the SEBI Act (and under the analogous provisions of the SCRA and Depositories Act) has been delegated to the whole time member (WTM). Alter making or causing to be made an enquiry, if the Board is satisfied that it is necessary to take any measures, the WTM may issue such directions as deemed appropriate.

Answer 4(c)

The main purposes for an interview in context of an audit are orientation, examination and confirmation:

Orientation of Audit Team : is normally part of the audit team's learning process during the planning phase. It aims at exploring and giving an overview of a specific area or function. e.g., by asking for presentations of activities, explanations of formal or informal networks or interpretation of documents (reports, instructions or budgets). The objective could be to identify possible audit subjects or to find out about other available sources of information such as key persons or documentation.

Examination of Audit Evidence : aims at more specific issues with a view to establishing new information, often to be used as audit evidence. In some cases, such information has not been previously recorded at all but is embodied in the interviewee through personal experiences, particular' references, opinions. etc. In other cases, the knowledge can be retrieved for example by (joint) interpretation of internal documents, reports or records.

It should be noted that evidence obtained from interviews often needs to be corroborated. i.e. supported by evidence from other data collection methods.

Confirmation of information: Finally, often goes together with either orientation or examination, but deserves to be mentioned as a separate purpose because of its fundamental importance. Confirmation, by definition, is typically based on information that has already been gathered. However, in this context the information can also be gathered and confirmed simultaneously. Not least in the planning phase. it is important to have basic conditions and facts explicitly confirmed by stakeholder's. However, in the execution phase there might also be a need to confirm facts and findings. If data is incorrectly understood, the quality of the whole audit may suffer and a lot of work may be in vain.

An interview can have one or two of these purposes, but normally not all three at the same time.

Answer 4(d)

The evidence gathering and evaluation is a simultaneous, systematic and an iterative process and involves:

(a) Gathering evidence by performing appropriate audit procedures;

(b) Evaluating the evidence obtained as to its sufficiency' (quantity) and appropriateness (quality);

(c) Re-assessing risk and gathering further evidence as necessary.

The evidence gathering and evaluation process should continue until the auditor is satisfied that sufficient and appropriate evidence exists to provide a basis for the auditors' conclusion.

Answer 4(e)

According to CSAS-1 Auditing Standard on Audit Engagement, the Auditor shall not have any substantial conflict of interest with the Auditee. Substantial Conflict of interest means:

Holding of more than 2% in the paid up share capital or shares of nominal value of rupees fifty thousand, whichever is lower or more than 2% voting power, as the case may be, by the Auditor singly or along with partners, spouse, parent, sibling, and child of such person or of the spouse, any of whom is dependent financially on such person.

Indebtedness of the Auditor for an amount exceeding rupees five lakh other than that arising out of ordinary course of business of the Auditee:

Provided that any indebtedness that may seriously impair his independence shall also be considered as substantial conflict of interest.

Where an Auditor was in employment of the Auditee, its holding or subsidiary company and 2 (two) years have not lapsed from the date of cessation of employment, the same shall be considered as substantial conflict of interest

The circumstances of the case suggest that indebtedness of J towards LKP Ltd. is such that, if he accepts the Audit of LKP Ltd., it may substantially impair the independence of J while forming an opinion on the basis of his audit findings and therefore considered as substantial conflict of interest. Therefore, in this case, J shall be debarred from accepting the Secretarial Audit assignment of LKP Ltd.

Question 5

(a) Why Escrow Account is maintained and what are the partners to it ? Calculate the escrow amount, if the consideration payable for an escrow account for a transaction under the public offer action is ₹860 crore.

(b) A reckless waste of firm's assets by speculating on the stock market and incompetence/ negligence in managing business of Lee Ltd., apart from omission, or perversion of truth and failure to file information and report were noticed. The

management of Lee Ltd. was in a dilemma whether to treat all these as fraud or non-compliance. Provide a note to the management of Lee Ltd. as a Practising Company Secretary regarding how to differentiate between Fraud and Non-Compliance.

(c) Decide the applicability of Secretarial audit of following companies for the year ending on 31st March, 2023 on the basis of information available as per latest audited financial statement, citing the relevant provisions of the Companies Act, 2013 :

(d) (i) ABC Ltd. (unlisted) having paid-up capital of ₹45 crore as on 31st December 2023 & further, the company has increased paid share capital by ₹10 crore on 30th June 2023.

(ii) Z Ltd. (unlisted) having a turnover ₹200 crore on 31st December 2022 and finally the company achieved the turnover of ₹300 crore on 31st March 2023.

(iii) LF Private Ltd. was having outstanding term-loan with X Bank of India for ₹150 crore as on 30th September 2022 and it was reduced to ₹125 crore as on 31st March 2023.

(5 marks each)

Answer 5(a)

An escrow account is a financial arrangement in which a third party holds and manages funds or assets on behalf of two other parties involved in a transaction. This third party, known as the escrow agent or escrow holder, is typically a trusted and neutral entity, such as a bank, attorney, or escrow company.

The primary purpose of an escrow account is to ensure that both parties fulfil their obligations and that the transaction proceeds smoothly. Escrow accounts help mitigate risks for both parties involved in a transaction. They provide a neutral play that ensures the terms of the agreement are met before releasing the funds or assets. This arrangement adds a level of security and trust to complex or high-value transactions.

The escrow amount shall be calculated in the following manner, as specified regulation 17 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 (SEBI (SAST) Regulations), for consideration payable under the public offer-

(i) On the first Rs. 500 crores - 25 per cent of the consideration

(ii) On the balance consideration – An additional amount equal to 10% of balance consideration.

If an open other 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.

In case of indirect acquisitions where public announcement has been made in terms of clause (e) of sub-regulation (2) of regulation 13 of the SEBI (SAST) Regulations, an amount equivalent to hundred per cent of the consideration payable in the open offer shall be deposited in the escrow account.

Calculation of Escrow Amount:

On First Rs.500 cr. ————————25% of Consideration = 25% of Rs. 860 cr. = Rs. 215 cr.——(i)

On balance consideration—10 % of balance Consideration = l0% of Rs. 360 cr.= Rs.36 cr.——(ii)

Total of (i) & (ii) is Rs. 251 Cr.

So amount of Rs. 251 cr. has to be maintained in the escrow account.

Answer 5(b)

Note regarding differences between Fraud and Non-Compliance

A fraud is always intentional, however, a non-compliance may be intentional or unintentional. The term fraud can be defined as act or course of deception, an intentional concealment, omission, or perversion of truth, to-

- gain unlawful or unfair advantage;
- induce another to part with some valuable item or surrender a legal right; or
- inflict injury in some manner.

Willful fraud is a criminal offense which calls for severe penalties, and its prosecution and punishment. However, incompetence or negligence in managing a business or even a reckless waste of firm's assets (for example by speculating on the stock market) does not normally constitute a fraud.

Non-Compliance : The term non-compliance refers to failure to comply with the laws, rules regulations etc.The term non-compliance is commonly used in regard to a failure to meet the compliance requirements or failure to doing compliance be it the failure in following procedures, filing of information, eligibility conditions, reporting etc.

The relationship between Fraud and non-compliance can be constructed as the non-compliance in the company may lead to a fraud, however it may also be noted that the fraud can also be made in the compliant company.

Answer 5(c)

Section 204(1) of the Companies Act, 2013 read with rule 9 of the Companies (Appointment and Remuneration of Managerial Personnel) Rules, 2014 provides that-

1. Every listed company;
2. Every public company having a paid-up share capital of fifty crore rupees or more;
3. Every public company having a turnover of two hundred fifty crore rupees or more; or
4. Every Company having outstanding loans or borrowings from banks or public financial institutions of one hundred crore rupees or more.

shall annex with its Board's Report made in terms of sub-section (3) of section 134, a Secretarial Audit Report, given by a Company Secretary in practice, in Form MR- 3.

Explanation. — For the purposes of sub-rule 9, it is hereby clarified that the paid-up share capital, turnover, or outstanding loans or borrowings as the case may be, existing on the last date of latest audited financial statement shall be taken into account.

In view of above provisions:

(i) Since, the paid-up capital of ABC Ltd. as on 31st March, 2023 is less than Rs. 50 Crore, Secretarial Audit is not applicable.

(ii) Secretarial audit is applicable on Z Ltd. as the turnover of Rs. 300 crore as on 31st March 2023 (as per explanation) which is within the prescribed limit of Rs. 250 crore or more.

(iii) Secretarial audit is applicable on LF Private Ltd as outstanding loans or borrowings from banks or public financial institutions is Rs. 125 crore as on 31st March, 2023 (as per explanation) which is above the prescribed limit of Rs. 100 crore or more.

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

Question 6

(a) R is a new female trainee in your firm, SKK Ltd. Explain her about the permanent file and its main contents in relation to auditor's working papers.

(b) The Company Secretary in employment as well as in practice is entrusted to ensure the compliance of applicable Secretarial Standards and report on compliances. Elucidate.

(c) As an exhaustive list of countervailing factors is not possible, so auditors strive to develop such characteristics in their audit firms, wherever possible to provide safeguards against the threats to objectivity. Enumerate such characteristics. Also explain in brief what do you mean by the Principle of Contradictory Process and Exit Conference.

(5 marks each)

OR (Alternate Question to Q. No. 6)

Question 6A

(i) S Ltd. was engaged in the business of providing services of tours & travels. The management of S Ltd. was very much worried, as the amount of resources used were out of proportion to the amount of services provided. Excessive wastes were also noticed. Advise S Ltd. about the audit that should be conducted in order to evaluate such situation. Specify the types of this audit, also explain the need of this audit.

(5 marks)

(ii) Materiality consists of both quantitative and qualitative factors. Materiality is often considered in terms of monetary value but the inherent nature or characteristics of an item or group of items may also render a matter material. List the issues that may be considered material even if the monetary value is not significant. Is materiality not a matter of professional judgement ? Explain.

(5 marks)

(iii) ILFS fraud was the largest corporate fraud in India and triggered a slowdown in the economy. Elucidate the statement covering how fraud was perpetuated in this case.

(5 marks)

Answer 6(a)

Permanent File : The permanent file usually contains documents and matters of continuing importance of clients' business which will be required for more than one audit. The data in these files are the information, which is of continuous interest and relevant to succeeding audits.

Data in this file can include the following:

A. Statutory Documents.

B. The rules and regulations of the company:

(a) Memorandum of Association

(b) Articles of Association

(c) Certificate of Incorporation/Commencement of Business

(d) Registration documents under various statutory bodies

C. Copies of documents of continuing importance and relevance to the auditor

(a) Letter of engagement and Board Resolution for appointment of the auditor

(b) Record of communication with the retiring auditor

(c) Royalty Agreement/Technical collaboration

(d) Copies of important legal documents/contracts

D. Addresses of the registered office and business -The Company's registered office address and all other units/premises, with a short description of the work carried on at such places.

E. An organizational chart- details of all departments and sub-divisions thereof showing hierarchy o management.

F. List of books and records with location - List of books and records maintained by the company and place of their location. Names, Positions, specimens of signatures and initials of persons responsible for books and document should also be included.

G. An outline history of the organization.

H. Analysis of significant ratios and trends.

I. Internal Controls - Notes on internal control with Details of study & evaluation of internal controls in the form of record, questionnaires or flow charts etc.

J. The business structure within a group and associated companies - List of all holding. Subsidiaries and associate companies.

K. Company's advisors - list of the company's advisors such as bankers. merchant bankers, stockbrokers, solicitors. valuers. insurance brokers etc.

Answer 6(b)

Reporting on Compliance with the applicable clause of Secretarial Standards by the Company Secretary: Section l18 (10) of the Companies Act, 2013 provides that every company shall observe Secretarial Standards with respect to General and Board meetings as specified by the Institute of Company Secretaries of India (ICSI). The Secretarial Auditor shall verify that the company has followed the applicable clauses of the Secretarial Standards.

Secretarial Standards are in conformity with the provisions of the applicable laws. However, if, due to subsequent changes in the law, a particular Standard or any part thereof becomes inconsistent with such law, the provisions of such law shall prevail.

The Secretarial Standard-1 is applicable to the Meetings of Board of Directors of all companies incorporated under the Act except One Person Company (OPC) in which there is only one Director on its Board and a company licensed under Section 8 of the Companies Act, 2013 or corresponding provisions of any previous enactment thereof. However, Section 8 companies need to comply with the applicable provisions of the Act relating to Board Meetings. The principles enunciated in SS-1 for Meetings of the Board of Directors are also applicable to Meetings of Committee(s) of the Board, unless otherwise stated therein or' stipulated by another applicable Guidelines. Rules or Regulations.

The Secretarial Standard-2 is applicable to all types of General Meetings of all companies incorporated under the Act except One Person Company (OPC) and a company licensed under Section 8 of the Companies Act, 2013 or corresponding provisions of and previous enactment thereof. However, Section 8 companies need to comply with the applicable provisions of the Act relating to General Meetings. The principles enunciated in this Standard for General Meetings of Members are applicable mutatis-mutandis to meetings of debenture-holders and creditors.

A meeting of the Members or class of Members or debenture-holders or creditors of a company under the directions of' the Court or the Company Law Board (CLB) or the National Company Law Tribunal (NCLT) or any other prescribed authority shall be governed by this Standard without prejudice to any rules, regulations and directions prescribed for and orders of such courts, judicial forums and other authorities with respect to the conduct of such Meetings.

The Company Secretary in employment as well as in practice is entrusted to ensure the compliance of applicable Secretarial Standards.

Answer 6(c)

An exhaustive list of countervailing factors is not possible, but Auditors should strive to develop the following characteristics in their audit firms, wherever possible to provide safeguards against these threats:

- Auditors should behave with integrity in all their professional and business relationships and to strive for objectivity in all professional and business judgments. These factors rank highly in the qualities that Auditors have to

demonstrate the same. They should therefore be well used to setting personal views and inclinations aside.

- Within every audit firm there should be strong peer pressure towards integrity. Reliance on one another's integrity should be the essential force which permits partners to entrust their public reputation and personal liability to each other.
- Audit Firms of all sizes should establish strong internal procedures and controls over the work of individual Auditors, so that difficult and sensitive judgements are reinforced by the collective views oil other Auditors, thereby also reducing the possibility of litigation.

The principle of contradictory process implies checking the accuracy of facts and incorporating responses from concerned persons. When two contradictory facts emerge on same subject matter of audit, Auditor must strive to find additional evidence/ material which supports or negates one of the facts. This process of finding additional evidence/ material must continue till one of the facts is eliminated. In case Auditor is unable to find further evidence/ material and contradiction continues to persist, Auditor should bring out that fact clearly in his report and if circumstances warrants, disclaim opinion on that particular subject matter.

The process also implies checking the accuracy of facts with the Auditee and incorporating responses from responsible officials as appropriate. The Auditor should consider relevant evidential matter regardless of whether it appears to corroborate or to contradict the assertions. Thus, during the conduct of an audit, the Auditor should consider all relevant evidential matter even though it might contradict or be inconsistent with other conclusions.

Exit Conference : While concluding the audit, the auditor should conduct a meeting with the management of the company or with the group supervisor officers. The audit observations should preferably be shared with such officials before hand for providing the opportunity to discuss the audit findings and to clarify any point relating to audit and audit observations.

Answer 6A(i)

Environment audit should be conducted by S Ltd. so as to evaluate with the situation stated in the given case. Environmental audit is a general term that can reflect various types of evaluations intended to identify environmental compliance and management system implementation gaps, along with related corrective actions and it has a wide variety of meanings Environmental Audit refers to verification and assessment of environmental measures in an organization.

There are generally two different types of environmental audits: compliance audits and management systems audits. These audits are intended to review the site's/ company's legal compliance status in an operational context. Compliance audits generally begin with determining the applicable compliance requirements against which the operations will be assessed. This tends to include Central Law. State Laws, permits and local laws. In some cases, it may also include requirements within legal action.

Need for this Environment Audit:

- Business can assess the environmental impact of their operations;

- To ensure that the corporate decisions are not spoiling company's market for its products, destroying the source of essential supply, damaging or polluting the very infrastructure that makes usage and demand of the product grow;
- It highlights areas of inefficiencies in process;
- It highlights excessive wastes;
- It provides opportunity for business to decrease its wastes output and reduce the cost of waste treatment or waste disposal.

Answer 6A(ii)

Issues that may be considered material even if the monetary value is not significant would include the following:

- Material by value
- Material by nature
- Material by context

(a) Fraud:

(b) Intentional unlawful acts or non-compliance;

(c) Incorrect or incomplete information to executive, the auditor or to the legislature (concealment);

(d) Intentional disregard to the executive, authoritative bodies or auditors; and

(e) Events and transactions made despite knowledge of the lack of legal basis to carry out the particular event or transaction.

Materiality is a matter of professional judgment and depends on the auditor's interpretation of the users' needs. A matter can be judged material if knowledge of it is likely to influence the decisions of the intended users.

Materiality should be considered by auditor while determining the nature, timing and extent of audit procedures and while evaluating the effect of misstatement.

Answer 6A(iii)

ILFS fraud as the largest corporate fraud in India and triggered a showdown in the economy, as the company was a key vehicle for infrastructure development of the country. Fraud occurred in spite of marquee shareholders like LIC. SBI etc. being the largest shareholders, having representatives on board. ILFS had the largest debt exposure of around Rs. 91,000 crores (including Rs. 20,000 crores invested by PF and pension funds).

Fraud was perpetrated mainly by:

- Diversion of borrowed funds to related entities of some of members of top management team;
- Imprudent lending to parties who were not credit worth for ulterior motives;

- Evergreening of loans by routing money front one group company to another through an unrelated party;
- Over invoicing of project costs by vendors, accounting of fake expenses etc. and difference being routed back to related entities of some of members of top management team;
- Overstatement of profits by non- provisioning of loans, accounting of fake expense, inappropriate recognition of project revenue etc.;
- The company had unprecedented number of subsidiaries and group companies, (346) which were used to route above transactions;
- Non — disclosure of some of these companies as related parties;
- Non-disclosure some of subsidiaries, associates, joint ventures.

Most of the mutual funds. insurance companies and PF gratuity funds had invested large sums in its debt issuance, due to the high credit rating of the company. It was a case of negligence by reputed credit rating agencies that rating was not downgraded in spite of clear signs of financial stress in the company. Rating was downgraded abruptly to lowest level from the highest only after the company defaulted in its repayment obligations.

Surprisingly, this public interest entity, was run for years by the same top management team, who were treating ILFS as personal property. Their subordinates and even Board were so overawed by their overpowering persona that no one dared to challenge their decisions. Fraud was going on for years, but could not be detected till the damage was done.

Like Satyam, the government suspended the board and appointed eminent experts to the board chaired by reputed and seasoned banker, Mr. Uday Kotak. Currently the company is under resolution process and some of its infrastructure has been sold.

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CORPORATE RESTRUCTURING, INSOLVENCY, LIQUIDATION & WINDING UP

Time allowed : 3 hours *Maximum marks : 100*

Total number of questions : 6

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

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

PART I

Question 1

(a) ABC Ltd. is planning for merger with RST Ltd. As a Company Secretary you have advised your management that all shareholders of transferor and transferee can give consent for the merger and thereby the shareholders meeting can be dispensed to save the time. However, CFO of your Company has raised a doubt on your view. Hence, the matter was put before a practicing Company Secretary, who will advise on the matter to the Company. As a practicing Company Secretary referring relevant provision and a case law give your opinion on the matter.

(5 marks)

(b) Due Diligence is an important exercise for any potential investment proposal. Discuss the importance of due diligence for a proposed Merger. Also enumerate the types of due diligence which may be taken for such a proposal.

(5 marks)

(c) One of the most important facets of the Indian merger control regime is the element of 'control'. Control over an enterprise has the ability to change the competitive dynamics of any market, and the Competition Commission of India (CCI), like all other competition regulators, gives due importance to changes in control. On this backdrop, elaborate on 'Control' and 'Group' under the Competition Act, 2002 and also through light on exemptions, if any under these definitions.

(5 marks)

(d) SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 impose an obligation on the acquirer together with person acting in concert to make public announcement of an open offer in the event of their becoming entitled to exercise 25% or more of the voting rights in the target company. What are the conditions under which the acquirer is exempt from making such open offer under Regulation 10(1) (a) of the regulations ?

(5 marks)

Answer 1(a)

As per Section 230(9) of the Companies Act, 2013, the National Company Law Tribunal (NCLT) may dispense with calling of a meeting of creditor or class of creditors

where such creditors or class of creditors, having at least ninety per cent value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.

In the matter of Scheme of Amalgamation between *Jupiter Alloys & Steel (India) Limited vs. Jupiter Wagon Limited,* the question of '*whether tribunal can grant dispensation of shareholders meeting regarding proposed scheme of amalgamation in case where all the shareholders have given consent and Companies Act provides only for dispensation of meetings of creditors having 90% value agreed and confirmed by way of affidavit?',* was laid before the Court.

The two member Hon'ble NCLT Kolkata Bench held that the word "may" as provided in section 230(9) of the Companies Act, 2013 introduces an element or essence of discretion, and thus vests in the NCLT an inherent power to dispense with the meeting of the member and/or creditors. Finally, the bench, noting that NCLT has inherent power under Rule 11 of National Company Law Tribunal Rules, 2016 read with Rule 24(2) of Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 (CAA Rules) allowed dispensation of the meeting of the shareholders, whilst observing the following:

"It cannot be ignored that almost all the High Courts have exercised this discretion since long and dispensed with the calling of the meetings in appropriate situations. The precedents created by the High Courts to dispense with the requirement of convening the meetings are worth and continuation of such precedents are virtue in the era of ease of doing businesses as well as future course of corporate actions. A settled issue should not be unsettled without proper reasons. Thus, the notion that calling of meetings is mandatory does not stand.

Based on the above-mentioned case law where all shareholders have given their consent and post-merger there shall be positive net worth and the creditors are not compromised, it is advised to the management to get the written consent of all shareholders of transferor and transferee so that the requirement of shareholders meeting can be dispensed with.

Answer 1(b)

The due diligence is an investigation or audit of a potential investment. It seeks to confirm all material facts in regard to a sale. It is a way of preventing unnecessary harm/hassles to either party involved in a transaction. It refers to the investigating effort made to gather all relevant facts and information that can influence a decision to enter into a transaction or not.

Due diligence is a meaningful analysis of the collected information to arrive at some decision about the potential transaction. The due diligence exercise is a crucial task. In this process the financial and non-financial information of the target company is to be collected and analysed in order to derive profitability after acquiring the target company.

Exercising due diligence is not a privilege but an unsaid duty of every party to the transaction. Due diligence is integral to business and the same is exercised in all transactions whether a simple over the-counter transaction or a complicated merger and acquisition transaction. While acquiring a company, the buyer must do thorough research of the credentials of the company, its market valuation, status of accounts receivables, product and brand involved, position in the debt market, status of legal and statutory compliances, past performance, etc. It is also essential to study the

previous financial reports to analyse the company's performance, to check the company background, its promoters, general reputation, and return to the existing shareholders.

Different type of Due-Diligence which can be undertaken for any proposed merger are as follows:

1. Financial Due Diligence: The target company's financial performance is one of the most critical elements one must review.
2. Legal Due Diligence: Litigation is one of the most expensive risks a company can undertake. This makes the legal aspects one of the most critical types of due diligence in mergers and acquisitions. It helps to determine the risk level for these and other legal factors.
3. Operational Due Diligence: Operational due diligence examines various aspects of production and workflow.
4. Human Resources Due Diligence: HR due diligence examines employment agreements, compensation packages, labor relations, and salary structure.
5. Intellectual Property Due Diligence: IP due diligence is crucial if the target company has unique products or services that give it a competitive advantage.
6. Environmental Due Diligence: It helps to assess the target company's environmental impact and sustainability practices along with compliance with environmental laws and regulations.
7. IT Environmental Due Diligence: IT environmental due diligence is crucial for any company in today's digital world.

Answer 1(c)

As per Section 5 of the Competition Act, 2002 (as amended in 2023), "Control" means the ability to exercise material influence, in any manner whatsoever, over the management or affairs or strategic commercial decisions by—

(i) one or more enterprises, either jointly or singly, over another enterprise or group; or

(ii) one or more groups, either jointly or singly, over another group or enterprise;

Further, “Group" means two or more enterprises where one enterprise is directly or indirectly, in a position to—

(i) exercise twenty-six per cent. or such other higher percentage as may be prescribed, of the voting rights in the other enterprise; or

(ii) appoint more than fifty per cent. of the members of the board of directors in the other enterprise; or

(iii) control the management or affairs of the other enterprise;

De Minimis Exemption: The Central Government has granted exemption to acquisition of small targets which is known as de minimis exemption. Combinations where the assets or the turnover is below the specific thresholds need not be notified to the Commission for its approval. According to Notification, all forms of combinations involving assets of not more than Rs.350 crore in India or turnover of not more than Rs.1,000 crore in India, are exempt from Section 5 of the Act for a period of 5 years.

The Government of India (MCA), through notification has extended the Small Target Exemption for another five years, i.e., until March 26, 2027.

Answer 1(d)

As per Regulation 10(1)(a) of SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 following acquisitions shall be exempt from the obligation to make open offer under regulation 3 and regulation 4 subject to the fulfilment of the conditions stipulated therefore, -

a) Acquisition pursuant to Inter-se transfer of shares amongst qualifying persons, being-

   i. Immediate relatives

   ii. Persons named as promoters in the share holding pattern filed by the target company in terms of the listing agreement or these regulations for nor less than three years prior to the proposed acquisition;

   iii. A company, its subsidiaries, its holding company, other subsidiaries of such holding company, persons holding not less than fifty percent of the equity shares of such company, other companies in which such persons holding not less than fifty percent of the equity shares, and their subsidiaries subject to control over such qualifying persons being exclusively held by the same persons.

   iv. persons acting in concert for not less than three years prior to the proposed acquisition, and disclosed a such pursuant to the requirement under the listing regulations or as the case may be, the listing agreement.

   v. Shareholders of a target company who have been persons acting in concert for a period of not less than three years prior to the proposed acquisition and are disclosed as such pursuant to the requirement under the listing regulations or as the case may be, the listing agreement, and any company in which the entire equity shares is owned by such shareholders in the same proportion as their holdings in the target company without any differential entitlement.

Provided that for purposes of availing of the exemption under this clause, —

a) if the shares, of the target company are frequently traded, the acquisition price per share shall not be higher by more than twenty-five per cent of the volume-weighted average market price for a period of sixty trading days preceding the date of issuance of notice for the proposed inter se transfer under sub regulation (5), as traded on the Stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period, and if the shares of the target company are infrequently traded, the acquisition price shall not be higher by more than twenty-five per cent of the price determined in terms of clause (e) of sub-regulation (2) of regulation 8: and

b) the transferor and the transferee shall have complied with applicable disclosure requirements set out in Chapter V.

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

Question 2

(a) Based on the following information find out the total amount of purchase consideration and the post-Merger Capital Structure of the Company. Capital structure of Transferor and Transferee Companies are as follows :

A Ltd. (Transferor Company)		*B Ltd. (Transferee Company)*	
1,00,00,000 Equity Shares of ₹ 10 each	*10,00,00,000*	*15,00,000 Equity Shares of ₹ 100 each*	*15,00,00,000*
5,00,000 10% Preference Shares of ₹ 100 each	*5,00,00,000*	*10,00,000 12% Preference Shares of ₹ 100 each*	*10,00,00,000*
1,00,000 11% Redeemable Debentures of ₹ 1,000 each	*10,00,00,000*		

The swap ratio is fixed as follows :

(a) For every 40 Equity Shares in A Ltd. 5 Shares of B Ltd.

(b) For every 5 Preference Shares in A Ltd. 4 Shares of B Ltd.

(c) Debentureholders will be allotted with 12% Redeemable Debentures of ₹ 1,000 each for every one Debenture held in A Ltd. (with no change in tenure)

(2+2+1=5 marks)

(b) "For funding of restructuring, various foreign currency denominated instruments are available". In this context explain in brief the concept of Depository receipts and eligibility conditions for issuance of the same.

(5 marks)

(c) Your Company is considering for demerger of one of its division and requested you to prepare a note on amortization of expenditure, carry forward and set off of business losses and unabsorbed depreciation as per the provisions of the Income Tax Act, 1961.

(5 marks)

OR (Alternate question to Q. No. 2)

Question 2A

(i) Explain the provisions relating to the power of Competition Commission of India to impose penalty for the non-submission of information on combination.

(5 marks)

(ii) *As a practicing Company Secretary, a client has approached you and sought your guidance on following procedural aspects of Fast Track Mergers.*

(a) *Declaration of Solvency*

(b) *Filing of Scheme*

(c) *Approval of the Scheme*

Prepare a brief note on the aforesaid points to be presented to your client.

(5 marks)

(iii) *A Company's performance will have an impact on its Valuation. Based on following information prepare a sensitive table on how changes in sales affects the Company's Enterprise Valuation :*

	Amount (INR Crore)	*Percentage*
Sales	*1000*	
Cost of Sales	*700*	*70% on Sales*
Gross Profit	*300*	
Fixed Cost	*150*	*(Constant upto INR 2000 Crore of Sales)*
Variable Cost	*100*	*10% on Sales*
Earnings before Tax (EBT)	*50*	
Tax	*12.50*	*25% of EBT*
Earning after Tax	*37.50*	
EPS (in ₹)	*25*	
P/E ratio of the industry	*20*	
Market Price per Share	*?*	
Enterprise Value	*?*	

The Company has 1.5 Crore Equity Shares of ₹ 10 each :

(i) *Find out the Market Value per Share and Enterprise Value. Also give your opinion on the results.*

(ii) *When the Sales of the Company increases by 10%.*

(iii) *When the Sales of the Company decreases by 10%.*

(1+2+2=5 marks)

Answer 2 (a)

Transferor Company - Existing Shareholding

Type of Shares/Debentures	**No. of Shares**	**Face Value**	**Total Value (INR)**
Equity	1,00,00,000	10	10,00,00,000
10% Preference	5,00,000	100	5,00,00,000
11% Debentures	1,00,000	1000	10,00,00,000
Total			25,00,00,000
Transferee Existing Shareholding			
Equity	15,00,000	**100**	15,00,00,000
12% Preference	10,00,000	**100**	10,00,00,000
Total			25,00,00,000

Shares allotted to Shareholders of Transferor Company - Purchase Consideration

	Shares of Existing holding	**New Shares to be allotted**	**Face value (INR)**	**Purchase Consideration (INR)**
Equity (Swap ratio)	40	5		
Total Shares	2,50,000	12,50,000	100	12,50,00,000
	(10000000/40)	(250000*5)		
Preference swap ratio)	5	4		
Total Shares	1,00,000	4,00,000	100	4,00,00,000
	(500000/5)	(100000*4)		
Total Purchase Consideration				16,50,00,000

Post-Merger Capital Structure

Type of Shares/Debentures	No. of Shares	Face Value (INR)	Total Value (INR)
Equity	27,50,000	100	27,50,00,000
12% Preference	14,00,000	100	14,00,00,000
11% Redeemable Debentures	1,00,000	1000	10,00,00,000

Note: Debentures being debt does not form part of purchase consideration.

Answer 2(b)

'Depository Receipt' means a foreign currency denominated instrument, whether listed on an international exchange or not, issued by a foreign depository in a permissible jurisdiction on the back of permissible securities issued or transferred to that foreign depository and deposited with a domestic custodian.

Here, Permissible Securities means equity shares and debt securities, which are in dematerialized form and rank *pari passu* with the securities issued and listed on a Recognized Stock Exchange.

'Depository Receipt' includes 'Global Depository Receipt' as defined in section 2(44) of the Companies Act, 2013 'as 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'.

A company may issue depository receipts provided it is eligible to do so in terms of the Scheme and relevant provisions of the Foreign Exchange Management Rules and Regulations.

The rules relating to the GDR are contained in Depository Receipts Scheme, 2014, which was issued vide Notification No. F. No. 9/1/2013-ECB dated 21st October, 2014.

Eligibility:

1. The following persons are eligible to issue or transfer permissible securities to a foreign depository for the purpose of issue of depository receipts:

    (a) any Indian company listed or unlisted, private or public;

    (b) any other issuer of permissible securities;

    (c) any person holding permissible securities; which has not been specifically prohibited from accessing the capital market or dealing in securities.

2. Unsponsored depository receipts on the back of listed permissible securities can be issued only if such depository receipts:

    (a) give the holder the right to issue voting instructions; and

    (b) are listed on an international exchange.

A company may issue depository receipts provided it is eligible to do so in terms of the Scheme and relevant provisions of the Foreign Exchange Management Rules and Regulations

Answer 2(c)

As per Income Tax Act, 1961 demerger in relation to companies, means the transfer, pursuant to a scheme of arrangement under Companies Act, 2013 by a demerged company of its one or more undertakings to any resulting company subject to conditions specified. The company before undertaking the demerger should consider the below mentioned provisions of Income Tax Act, 1961 with respect to the amortization of expenditure and carry forward & set-off of business losses and unabsorbed depreciation respectively:

Amortisation of expenditure in case of amalgamation or demerger

Section 35DD (1) of the Income Tax Act, 1961 provides that where an assessee, being an Indian company, incurs any expenditure wholly and exclusively for the purposes of demerger of an undertaking, the assessee shall be allowed a deduction of an amount equal to one-fifth of such expenditure for each of the five successive previous years beginning with the previous year in which the demerger takes place.

Further, as per section 35DD (2) of the Income Tax Act, 1961 no deduction shall be allowed in respect of the expenditure mentioned in sub-section (1) under any other provision of this Act.

Carry forward and set off of business losses and unabsorbed depreciation of the demerged company

Section 72A (2) of the Income Tax Act states that notwithstanding anything contained in sub-section (1), the accumulated loss shall not be set off or carried forward and the unabsorbed depreciation shall not be allowed in the assessment of the amalgamated company unless—

(*a*) the amalgamating company—

(*i*) has been engaged in the business, in which the accumulated loss occurred or depreciation remains unabsorbed, for three or more years;

(*ii*) has held continuously as on the date of the amalgamation at least three-fourths of the book value of fixed assets held by it two years prior to the date of amalgamation;

(*b*) the amalgamated company—

(*i*) holds continuously for a minimum period of five years from the date of amalgamation at least three-fourths of the book value of fixed assets of the amalgamating company acquired in a scheme of amalgamation;

(*ii*) continues the business of the amalgamating company for a minimum period of five years from the date of amalgamation;

(*iii*) fulfils such other conditions as may be prescribed[41] to ensure the revival of the business of the amalgamating company or to ensure that the amalgamation is for genuine business purpose.

In a case where any of the conditions laid down in sub-section (2) are not complied with, the set off of loss or allowance of depreciation made in any previous year in the hands of the amalgamated company shall be deemed to be the income of the amalgamated company chargeable to tax for the year in which such conditions are not complied with. [Section 72A (3)]

Section 72A (4) of the Income Tax Act provides that notwithstanding anything contained in any other provisions of this Act, in the case of a demerger, the accumulated loss and the allowance for unabsorbed depreciation of the demerged company shall—

(*a*) where such loss or unabsorbed depreciation is directly relatable to the undertakings transferred to the resulting company, be allowed to be carried forward and set off in the hands of the resulting company;

(*b*) where such loss or unabsorbed depreciation is not directly relatable to the undertakings transferred to the resulting company, be apportioned between the demerged company and the resulting company in the same proportion in which the assets of the undertakings have been retained by the demerged company and transferred to the resulting company, and be allowed to be carried forward and set off in the hands of the demerged company or the resulting company, as the case may be.

Section 72A (5) of the Income Tax Act the Central Government may, for the purposes of this Act, by notification in the Official Gazette, specify such conditions as it considers necessary to ensure that the demerger is for genuine business purposes.

Answer 2A(i)

According to Section 43A of Competition Act, 2002(as amended in 2023) If any person or enterprise fails to give notice to the Commission under sub-section (2) or sub-section (4) of section 6 or contravenes sub-section (2A) of section 6 or submit information pursuant to an inquiry under sub-section (1) of section 20, the Commission may impose on such person or enterprise, a penalty which may extend to one per cent., of the total turnover or assets or the value of transaction referred to in clause (d) of section 5, whichever is higher, of such a combination:

It may be noted that in case any person or enterprise has given a notice under sub-section (4) of section 6 and such notice is found to be void ab initio under sub-section (6) of section 6, then a notice under sub-section (2) of section 6 may be given by the acquirer or parties to the combination, as may be applicable, within a period of thirty days of the order of the Commission under sub-section (6) of that section and no action under this section shall be taken by the Commission till the expiry of such period of thirty days.

Answer 2A(ii)

Section 233 of the Companies Act, 2013 along with the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 lay down the certain procedures for fast-track mergers.

(a) Declaration of solvency:

Procedure	Timeline	Forms Required	Who shall be Required to comply
Both the companies are required to file a declaration of solvency with the respective area ROCs where registered offices of respective companies are situated.	This is to be done before the meeting of shareholders or the meeting of creditors is convened.	Form CAA 10	Both the transferor and transferee companies are required to comply with this provision.

(b) Filing of the Scheme:

Procedure	Timeline	Forms Required	Who shall be Required to comply
A copy of the scheme along with a report of result of each of the meeting in Form No. CAA 11 shall be filed with the Regional Director. A copy of the scheme along with Form CAA 11 is also required to be filed with the ROC in Form GNL1 and the Official Liquidator. It shall be hand-delivered or sent through speed post or registered post to Official Liquidator.	Within 7 days of after the conclusion of the meeting of members or class of members or creditors.	Form CAA 11 results of the all meetings Form GNL1	Filing w.r.t. Regional Director is required to be done by transferee company.

(c) Approval of the Scheme by Regional Director/Central Government:

(i) Where no objection or suggestion is received within a period of thirty days of receipt of copy of scheme under section 233(2), from the Registrar of Companies and Official Liquidator by the Central Government and the Central Government is of the opinion that the scheme is in the public interest or in the interest of creditors, it may, within a period of fifteen days after the expiry of said thirty days, issue

a confirmation order of such scheme of merger or amalgamation in Form No. CAA.12:

(ii) If the Central Government does not issue the confirmation order within a period of sixty days of the receipt of the scheme under of section 233(2), it shall be deemed that it has no objection to the scheme and a confirmation order shall be issued accordingly.

(iii) Where objections or suggestions are received within a period of thirty days of receipt of copy of scheme under section 233(2) from the Registrar of Companies or Official Liquidator or both by the Central Government and

(a) such objections or suggestions of Registrar of Companies or Official Liquidator, are not sustainable and the Central Government is of the opinion that the scheme is in the public interest or in the interest of creditors, it may within a period of thirty days after expiry of thirty days referred to above, issue a confirmation order of such scheme of merger or amalgamation in Form No. CAA.12.

(b) the Central Government is of the opinion, whether on the basis of such objections or otherwise, that the scheme is not in the public interest or in the interest of creditors, it may within sixty days of the receipt of the scheme file an application before the Tribunal in Form No. CAA.13 stating the objections or opinion and requesting that Tribunal may consider the scheme under section 232 of the Act:

Provided that if the Central Government does not issue a confirmation order under clause (a) or does not file any application under clause (b) within a period of sixty days of the receipt of the scheme under sub section (2) of section 233 of the Act, it shall be deemed that it has no objection to the scheme and a confirmation order shall be issued accordingly.

(iv) The confirmation order of the scheme issued by the central government or tribunal under section 233(7) of the Act, shall be filed, within thirty days of the receipt of the order of confirmation, in Form INC-28 along with the fees as provided under companies (Registration Offices and Fees)rules 2014 with the Registrar of companies respectively.

Answer 2A(iii)

No. of Shares	1,50,00,000
Market Price	500 (25*20)
(P/E Ratio x EPS)	
Enterprise Value in Rs.	7,50,00,00,000 (1,50,00,000*500)

(No. of Shares x Market price per share)			
Sensitivity Table	**Present**	**Sale increases by 10%**	**Sale decreases by 10%**
Sales (Cr)	1000	1100	900
Cost of Sales (Cr)	700	770	630
Gross Profit (Cr)	300	330	270
Fixed Cost (Constant up to INR 2000 Cr of Sales) (Cr)	150	150	150
Variable Cost (10% on Sales) (Cr)	100	110	90
Earnings before Tax (EBT) (Cr)	50	70	30
Tax (25% of EBT) (Cr)	12.50	17.50	7.50
Earning after Tax	37.50	52.50	22.50
EPS (in Rs.)	25	35	15
P/E ratio of the industry	20	20	20
Market Price per Share	500	700	300
Enterprise Value	7,50,00,00,000	10,50,00,00,000	4,50,00,00,000
Change in Market Value per Share		200	-200
Market change (%)		40%	-40%
Change in Enterprise Value		3,00,00,00,000	-3,00,00,00,000
Change in %		40%	-40%
Change in Sales by 10% impacts Market price of Share by Rs. 200 and Enterprise Value by Rs.300 crore in value and by 40%.			

Question 3

(a) You are one of the Company Secretary in the big multi-national conglomerate, which is contemplating a merger. As the Management is keen on completion of merger without any regulatory hiccups, your department head have advised you to sought an informal consultation with Competition Commission. Suggest the management if such informal consultation is allowed. Brief the process of informal consultation with Competition Commission prior to business combinations and the conditions applicable, if any.

(b) Briefly discuss on 'Earnouts' and 'Carveouts' in Cross Border Mergers.

(c) Discuss the provisions for Escrow Account for open market Buy Back through Stock Exchange.

(d) QR Private Limited, a Start-up company proposes for merger with MN Private Limited a small Company. Explaining the meaning of 'Start-up', brief whether the merger proposal can be carried out without the approval of the National Company Law Tribunal. If yes, name the authority with whom they have to approach for such merger.

(e) Spinoff is one type of Demerger wherein the Shares of new entity is being distributed to the shareholders of parent company on a pro-rata basis. Explain in brief the reasons for Spinoff.

(3 marks each)

Answer 3(a)

In accordance with international best practices, the Competition Commission of India allows for an informal and verbal consultation prior to filing of the notice to a proposed combination in terms of Regulation 5 of CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011 read with Section 6(2) of the Competition Act, 2002 with the Commission.

The parties intending to file a notice with the Commission are encouraged to approach the Commission for pre filing consultations. A request for pre-filing consultation should be made by the parties at the earliest and at least 10 days before the intended date of filing so that the commission gets ample amount of time to allocate appropriate team expert in particular case for pre-filing consultations. A copy of draft application comprising of Form I/II, as the case may be and supporting documents should be forwarded along with the request for scheduling a pre-filing consultation.

Such pre-filing consultations help the parties intending to file a notice with the Commission, in identifying the information required for filing a complete and correct Form I/II/III along with identification of additional information that the Commission may require to assess the likely impact of the proposed combination on competition in the relevant markets.

Hence, it is apprised to the management that such informal consultation is allowed.

A summary of the proposed combination along with the following details should also be submitted: (a) Basic details of the proposed combination including various steps involved in the same; (b) A brief description of the relevant market(s) and sector(s) involved; (c) The likely impact of the proposed combination on competition in those

markets and sectors in general terms; (d) Key issues regarding which the parties wish to seek consultation from the Commission; (e) Any other details which according to the parties may be pertinent for a meaningful consultation.

Answer 3(b)

An 'Earnout' is a contingent consideration whereby Buyer of the Target would decide an amount which is to be paid provided certain contingent considerations to happen. Cross Border Mergers specially covering Information Technology (IT), Technological Mergers, Banking Mergers are subject to Contingent Considerations. Earnouts are divided into below 3 types:

- Cash Earnouts
- Equity Earnouts
- Stock Compensation Earnouts

A Carveout is a Potential divestiture of a business unit in which a parent company sells minority interest of a Child Company to outside Investors. A Carveout allows a company to capitalize on a business segment that many not be part of its core operations. A carve-out effectively separates a subsidiary or business unit from its parent as a standalone company. The new organization has its own board of directors and financial statements. However, the parent company usually retains a controlling interest in the new company and offers strategic support and resources to help the business succeed. Unlike a spin-off, the parent company generally receives a cash inflow through a carve-out.

Answer 3(c)

The following are the provisions for Escrow Account for open market buy back through stock exchange:

a) The company shall, within two working days of the public announcement, as and by way of security for performance of its obligations under the regulations, deposit in an escrow account such sum as specified as below

b) The escrow amount shall be payable in the following manner:

   i. if the consideration payable does not exceed Rupees100 crores;25 per cent of the consideration payable;

   ii. if the consideration payable exceeds Rupees100 crores; 25 per cent upto Rupees100 crores and 10 percent thereafter.

c) The escrow account referred to in this regulation shall, subject to appropriate margin as specified by the Board, consist of,

   i. cash including bank deposits deposited with any scheduled commercial bank, or

   ii. bank guarantee issued in favour of the merchant banker by any scheduled commercial bank, or

   iii. deposit of frequently traded and freely transferable equity shares or other freely transferable securities, or

   (iiia) government securities, or

(iiib) units of mutual funds invested in gilt funds and overnight schemes, or

iv. a combination of above

Explanation: The cash component of the escrow account may be maintained in an interest-bearing account, provided that the merchant banker ensures that the funds are available at the time of making payment to shareholders.

d) Where the escrow account consists of deposit with a scheduled commercial bank, the company shall, while opening the account, empower the merchant banker to instruct the bank to make payment the amount lying to the credit of the escrow account, as provided in the regulations.

e) Where the escrow account consists of a bank guarantee, such bank guarantee shall be in favour of the merchant banker and shall be valid until thirty working days after the expiry of buy-back period or until the completion of all obligations under these regulations, whichever is later.

Explanation: The bank guarantee shall not be returned by the merchant banker until the completion of all obligations under these regulations.

f) The company shall, in case the escrow account consists of securities, empower the merchant banker to realise the value of such escrow account by sale or otherwise and if there is any deficit on realisation of the value of the securities, the merchant banker shall be liable to make good any such deficit.

g) In case the escrow account consists of approved securities, these shall not be returned by the merchant banker till completion of all obligations under the regulations.

h) Where part of the escrow account is in a form other than cash, the company shall deposit with a scheduled commercial bank, in cash, a sum of not less than two and half per cent of the total amount earmarked for buyback as specified in the resolution of the Board of Directors or the special resolution, as the case may be, as security for the fulfilment of its obligations under the regulations.

I) On payment of consideration to all the securities holders who have accepted the offer and after completion of all formalities of buy-back, the amount, guarantee and securities in the escrow, if any, shall be released to the company.

j) The Board in the interest of the securities holders may in case of nonfulfillment of obligations under the regulations by the company forfeit the escrow account either in full or in part

The amount forfeited under clause (j)may be distributed pro rata amongst the securities holders who accepted the offer and balance, if any, shall be utilised for investor protection.

Answer 3(d)

Section 233 of the Companies Act, 2013 prescribes simplified procedure for merger or amalgamation of

- two or more small companies, or
- between a holding company and its wholly-owned subsidiary company, or
- such other class or classes of companies as maybe prescribed

As per Explanation to Rule 25(1) (1A) of Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2021, "start-up company" means a private company incorporated under the Companies Act, 2013 or Companies Act, 1956 and recognized as start-up in accordance with the notification issued by the DPIIT, Ministry of Commerce and Industry." Further, a scheme of merger or amalgamation under section 233 of the Act may be entered into between any of the following class of companies, namely: -

i. two or more start-up companies, or

ii. one or more start-up company with one or more small company.

Yes, merger proposal can be carried out without the approval of the National Company Law Tribunal. Pursuant to the provisions of section 233 of the Act along with Rule 25 of the Companies (Compromises, Arrangements and Amalgamation) Rules, these Companies can make application to the Regional Director of Ministry of Corporate Affairs, Government of India for fast-track merger.

Answer 3(e)

In a spin off, the shares of the new entity are distributed to the shareholders of the parent company on a pro-rata basis. There are two approaches in which Spin offs may be conducted.

In the first approach, the company distributes all the shares of the new entity to its existing shareholders on a pro-rata basis. This leads to the creation of two different companies holding the same proportions of equity as compared to the single company existing previously.

The second approach is the floatation of a new entity with its equity being held by the parent company. The parent company later sells the assets of the spun off company to another company.

In both the approaches, the parent company also retains ownership in the spin-off entity.

A spinoff may occur for various reasons, such reasons may include:

i. A company may conduct a spinoff so it can focus its resources and better manage the division that has more long-term potential.

ii. Businesses wishing to streamline their operations often sell less productive or unrelated subsidiary as spinoffs. For Example, a company might spin off one of its mature business units that are experiencing little or no growth so it can focus on a product or service with higher growth prospects.

iii. a portion of the business is headed in a different direction and has different strategic priorities from the parent company, the company may adopt spin off so it can unlock value as an independent operation.

The downside of spin off is that their share price can be more volatile and can tend to underperform in weak markets and outperform in strong markets. Spinoffs can also experience high selling activity and the share price may dip in the short term because of this selling activity, even if the spin offs long term prospects are positive.

PART II

Question 4

(a) *PQ Private Limited is under Corporate Insolvency Resolution Process (CIRP). The CIRP was initiated based on an application filed by Operational Creditor of PQ Private Limited. The Resolution professional appointed by National Company Law Tribunal is carrying out CIRP process has published advertisements for Expression of Interest (EoI). In the meantime both PQ Private Limited and the Operational Creditor who has initiated the CIRP have arrived at settlement and would like to file withdrawal application. One of the other Operational Creditor has contended that once CIRP has commenced and advertisement for EoI is given, the CIRP cannot be withdrawn. Referring relevant case law and suitable provisions of the Regulations answer whether the contention of the other Operational Creditor is tenable.*

(5 marks)

(b) *What are the orders that can be issued by The Debt Recovery Tribunal (DRT) once the dues have been finalised to be paid. If the DRT has issued a certificate of recovery against a Company and such company is under liquidation. What orders can be issued by the DRT to recover the dues ?*

(5 marks)

(c) *Whether National Company Law Tribunal or National Company Law Appellate Tribunal has a right to interfere with the decision of Committee of Creditors (CoC). Discuss in view of some decided case law.*

(5 marks)

(d) *EF LLP was under Corporate Insolvency Resolution Process (CIRP) and NCLT has approved the Resolution Plan submitted by XY Private Limited, who is totally unrelated to the EF LLP or its Partners. Prior to initiating of CIRP the EF LLP has entered into commercial agreement with Q Ltd to supply them the goods manufactured by EF LLP for a particular period. But EF LLP did not supply as per the terms and Q Ltd suffered huge loss due to breach of contract by EF LLP. Now after Resolution and successful commencement of business again by EF LLP, Q Ltd would like to claim damages for breach of contract. Referring relevant provisions answer whether Q Ltd can claim damages for breach of Contract.*

(5 marks)

Answer 4 (a)

As per section 12A of Insolvency and Bankruptcy Code, 2016, the Adjudicating Authority may allow the withdrawal of application admitted under section 7 or section 9 or section 10, on an application made by the applicant with the approval of ninety per cent voting share of the committee of creditors, in such manner as may be specified.

Regulation 30A(1)(b) of Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016 also provides that application for withdrawal under section 12A of Code may be made to the Adjudicating Authority after the constitution of the committee, by the applicant through the resolution

professional, subject to the applicant stating the reasons justifying withdrawal, if the application for withdrawal made after issue for expression of interest under regulation 36A.

In the matter of '*Brilliant Alloys Pvt. Ltd. vs. Mr. S. Rajagopal & Ors.'*, Hon'ble Supreme Court held that Regulation 30A of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations 2016 has to be read subject to Section l2A of the Insolvency and Bankruptcy code, 2016 which does not impose the condition that withdrawal application has to be filed before the invitation of expression of interest. Thus, the Apex Court upheld withdrawal of CIRP even after the Resolution Professional issued invitation for expression of interest from resolution applicants to submit resolution plans under Regulation 36A of IBBI (Insolvency Resolution Process for Corporate Persons) Regulations, 2016. A similar stand was taken by Apex Court in the matter of *Abhishek Singh vs Huhtamaki PPL Ltd.*

Hence, keeping in light the provisions of Insolvency and Bankruptcy Code and Regulations, the contentions of other operational creditor are not tenable.

Answer 4(b)

When it is proved to the satisfaction of the Debt Recovery Tribunal (Tribunal) that the claim of the applicant has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties or where the defendant has repaid or agreed to repay the claim of the applicant, further, the Tribunal may after giving the applicant and the defendant, an opportunity of being heard, in respect of all claims, set-off or counter-claim, if any, and interest on such claims, within thirty days from the date of conclusion of the hearings, pass interim or final order as it deems fit which may include order for payment of interest from the date on which payment of the amount is found due up to the date of realisation or actual payment. The Tribunal after it appeared to be just and convenient, the Tribunal may, by order. —

a. Appoint a receiver of any property

b. Remove a person from the possession or custody of the property,

c. Commit the same to the possession, custody or management of the receiver

d. Confer upon the receiver all such powers as the Tribunal thinks fit

e. Appoint a commissioner for preparation of inventory

Where a certificate of recovery is issued against a company as defined under the Companies Act, 2013 and such company is under liquidation, the Tribunal may by an order direct that the sale proceeds of secured assets of such company be distributed in the same manner as provided in section 326 of the Companies Act, 2013 or under any other law for the time being in force.

Answer 4(c)

The Insolvency and Bankruptcy Code, 2016 has provided the Committee of Creditors (CoC) with exclusive access to negotiations along with the ultimate authority to deal and finalise the business and commercial decisions. Thereby the Committee of creditors is also ended with the mammoth responsibility of evaluating resolution plans

and thereafter voting and approving the best resolution plan. Commercial Wisdom of the CoC has been held to be sacrosanct by various judicial precedents.

In the case of *'Kalparaj Dharamshi and another vs. Kotak Investment Advisors Ltd. And mother,* the Apex Court observed that the evaluation of proposals to keep the entity as a going concern, including decisions about the sale of business or units, re-structuring of debt etc., are required to be taken by the Committee of the Financial Creditors. The Apex Court further observed that it has been provided, that the choice of the resolution to keep the entity as a going concern will be voted upon by the Committee and there are no constraints on the proposals that the resolution professional can present to the Committee. It was held that the NCLT or the NCLAT cannot interfere with the commercial wisdom of the Committee of Creditors, except within the limited scope under section 30 and 31 of the Code.

It was further held that the commercial wisdom of the Committee has been given paramount status without any judicial intervention for ensuring completion of the stated processes within the timelines prescribed by the Code. The court further held that there is an intrinsic assumption that the financial creditors are fully informed about the viability of the corporate debtor and feasibility of the proposed resolution plan.

In another notable judgement, the Hon'ble Supreme court in the matter of *K. Sashidhar vs. Indian Overseas Bank* curtailed the jurisdiction of the NCLT by observing that the NCLT has no jurisdiction and authority to analyse or evaluate the commercial decision of the Committee of Creditors and to enquire into the justness of the rejection of the resolution plan by the dissenting financial creditors. The Hon'ble Supreme Court in *M.K. Rajagopalan vs. Dr. Periasamy Palani Gounder* had disregarded the technicality of noncompliance of non-publication of Form G and instead assigned primacy to the commercial wisdom of the CoC. Hence, based on the above, NCLT or NCLAT do not have a right to interfere with the decision of CoC.

Answer 4 (d)

As per section 32A (1) of the Insolvency & Bankruptcy Code the liability of a corporate debtor for an offence committed prior to the commencement of the corporate insolvency resolution process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved by the Adjudicating Authority under section 31.

According to section 32A (2) of the Insolvency & Bankruptcy Code no action shall be taken against the property of the corporate debtor in relation to an offence committed prior to the commencement of the corporate insolvency resolution process of the corporate debtor, where such property is covered under a resolution plan approved by the Adjudicating Authority, if the resolution plan results in the change in the management or control of the corporate debtor to a person who was not-

(a) a promoter or in the management or control of the corporate debtor or a related party of such a person; or

(b) a person with regard to whom the relevant investigating authority has, on the basis of material in its possession, reason to believe that he had abetted or conspired for the commission of the offence, and has submitted or filed a report or a complaint to the relevant statutory authority or Court

It is further to be noted that if a prosecution had been instituted during the corporate insolvency resolution process against such corporate debtor, it shall stand discharged from the date of approval of the resolution plan subject to requirements of this sub-section having fulfilled.

Apex Court in the case of *Ghanashyam Mishra and Sons Private Limited Vs. Edelweiss Asset Reconstruction Company Limited* stated that, on the date of approval of the Resolution Plan by the Adjudicating Authority, all such claims which are not a part of the Resolution Plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not a part of the Resolution Plan. The legislative intent behind this is to freeze all the claims so that the Resolution Applicant starts on a clean slate and is not flung with any surprise claims.

Accordingly, Q Ltd cannot proceed against EF LLP whose management is totally changed due to approval of Resolution plan of XY Private Limited, approved by the Adjudicating Authority. Hence, Q Ltd, cannot proceed against EF LLP or its present Partners for the breach done prior to CIRP.

Question 5

(a) *"The Resolution plan is not a sale or auction or recovery or liquidation but a resolution of the Corporate Debtor as a going concern." Referring relevant case law highlight on the importance of the statement.*

(3 marks)

(b) *Your company has received recovery notice from a Creditor with whom receivables of the Company are discounted with Chief Financial Officer (CFO) of your Company is of the view that this is not covered as 'Financial Debt' under Insolvency and Bankruptcy Code, 2016 as the receivables are sold on non-recourse basis. Referring the relevant provisions comment whether the contention of CFO is correct.*

(3 marks)

(c) *A Bank has initiated insolvency proceedings against the personal guarantors of a Corporate Debtor, in the list of assets of a personal guarantor, one of the asset is 'pension plan' taken in the name of spouse of the personal guarantor. The Insolvency Professional has sorted your opinion as to whether the above pension plan can be included as assets of the personal guarantor. Clarify referring relevant provisions of the Insolvency and Bankruptcy Code, 2016.*

(3 marks)

(d) *What are the general duties of a debtor under the Fresh Start Process under the Insolvency and Bankruptcy Code 2016.*

(3 marks)

(e) *Whether the Former Directors of the Company on which insolvency proceedings have been initiated are entitled to receive the copy of the Resolution Plan from the Resolution Professional. Comment.*

(3 marks)

Answer 5 (a)

In the matter of *Binani Industries Limited v. Bank of Baroda & Anr,* the National Company Law Appellate Tribunal (NCLAT), noticed the object of the Insolvency & Bankruptcy Code, 2016 and laid down that the first order objective is "resolution", the second order objective is "maximisation of value of assets of the 'Corporate Debtor'' and the third order objective is "promoting entrepreneurship, availability of credit and balancing the interests of all the stakeholders."

The Hon'ble Appellate Tribunal also held that the Insolvency & Bankruptcy Code defines 'Resolution Plan' as a plan for insolvency resolution of the 'Corporate Debtor' as a going concern, and not as a sale, or auction, or recovery or liquidation**.**

The Tribunal held that the resolution plan is:

- not an auction: Each resolution plan has a different likelihood of turnaround depending on credibility and track record of 'Resolution Applicant' and feasibility and viability of a 'Resolution Plan' are not amenable to bidding or auction. It requires application of mind by the 'Financial Creditors' who understand the business well.
- not recovery: Recovery is an individual effort by a creditor to recover its dues through a process that has debtor and creditor on opposite sides. The 'I&B Code' prohibits and discourages recovery.
- not a liquidation: The IBC does not allow liquidation of a Corporate Debtor directly and permits liquidation only on failure of the resolution process. The 'Insolvency & Bankruptcy Code', therefore, does not allow liquidation of a 'Corporate Debtor' directly. It allows liquidation only on failure of 'Corporate Insolvency Resolution Process'.

Insolvency & Bankruptcy Code rather facilitates and encourages resolution in several ways. Insolvency & Bankruptcy Code aims to balance the interests of all stakeholders.

Answer 5(b)

As per Section 5(8) of Insolvency & Bankruptcy Code, 2016 "Financial Debt" means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and includes —

(a) money borrowed against the payment of interest;

(b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;

(c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;

(d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;

(e) Receivables sold or discounted other than any receivables sold on non-recourse basis,

(f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing:

In view of definition “Financial Debt” and as per the Insolvency & Bankruptcy Code receivables discounted other than any receivables on non-recourse basis is only covered has financial debt, hence the contention of the CFO is not correct in the given case as the receivables are sold on non-recourse basis.

Answer 5(c)

As per Section 79(14) of Insolvency & Bankruptcy Code, “excluded assets” includes –

(a) unencumbered tools, books, vehicles and other equipment as are necessary to the debtor or bankrupt for his personal use or for the purpose of his employment, business or vocation,

(b) unencumbered furniture, household equipment and provisions as are necessary for satisfying the basic domestic needs of the bankrupt and his immediate family;

(c) any unencumbered personal ornaments of such value, as may be prescribed, of the debtor or his immediate family which cannot be parted with, in accordance with religious usage;

(d) any unencumbered life insurance policy or pension plan taken in the name of debtor or his immediate family; and

(e) an unencumbered single dwelling unit owned by the debtor of such value as may be prescribed;

As per aforesaid provisions of the Insolvency & Bankruptcy Code the pension plan in the name of spouse, who is the immediate family of the personal guarantor falls within the list of excluded assets and hence, the same cannot be included in the list of assets of the personal guarantor.

Answer 5(d)

As per section 88 of Insolvency and Bankruptcy Code, 2016, the debtor has the following general duties under fresh start process:

(a) make available to the resolution professional all information relating to his affairs, attend meetings and comply with the requests of the resolution professional in relation to the fresh start process.

(b) inform the resolution professional as soon as reasonably possible of—

  (i) any material error or omission in relation to the information or document supplied to the resolution professional; or

  (ii) any change in financial circumstances after the date of application, where such change has an impact on the fresh start process.

Answer 5(e)

As per section 24(3)(b) of Insolvency and Bankruptcy Code, 2016, the resolution professional shall give notice of each meeting of the committee of creditors to members of the suspended Board of Directors or the partners of the corporate persons, as the case may be. As per provision of section 24(4) the directors, as referred to in sub-section (3)(b), may attend the meetings of committee of creditors, but shall not have any right to vote in such meetings.

In the matter of *Vijay Kumar Jain vs. Standard Chartered Bank and others*, an appeal was filed with Supreme Court against orders rejecting the prayer of an erstwhile director for getting copy of the resolution plans from the Resolution Professional. Both the NCLT and NCLAT ruled that appellant had no right to receive the resolution plans and the Resolution Professional has contended that only the members of CoC are entitled to have resolution plans, as per Section 30(3) IBC read with Regulation 39(2) of CIRP Regulations.

The Supreme Court expressly rejected the argument based on relying on notes on clauses of section 24 of the code and held that every participant is entitled to a notice of every meeting of the committee of creditors. Such notice of meeting must contain an agenda of the meeting, together with the copies of all documents relevant for matters to be discussed and the issues to be voted upon at the meeting vide Regulation 21(3)(iii). Obviously, resolution plans are "matters to be discussed" at such meetings, and the erstwhile Board of Directors are "participants" who will discuss these issues."

It was held that members of the erstwhile Board of Directors, being vitally interested in resolution plans that may be discussed at meetings of the committee of creditors, must be given a copy of such plans as part of "documents" that have to be furnished along with the notice of such committee of creditor (CoC) meetings.

The Judgement also clarified that the resolution professional can take an undertaking from the erstwhile director to maintain confidentially of the information.

Attempt All parts of either Q. No.6 or Qn. No. 6A

Question 6

(a) Ritu Housing Finance Company Limited initiated Corporate Insolvency Resolution Process against its corporate debtor Raj Infrastructure Limited under section 7 of The Insolvency and Bankruptcy Code, 2016. The National Company Law Tribunal dismissed the application as not maintainable. The reason given was that winding up proceedings have already been initiated by the High Court. Quoting any decided case law confirm whether the application under section 7 of the Code is maintainable when winding up proceeding against the corporate debtor have already been initiated ?

(5 marks)

(b) "The term 'default' under SARFAESI Act and the Insolvency and Bankruptcy Code, 2016 are different and based on purpose of the Acts." Examine the statement by analyzing the definition under the both Acts.

(5 marks)

(c) The Committee of Creditors of a Corporate Debtor by passing a resolution with fifty five per cent of voting shares, wants to remove Mr. B as a Resolution Professional after taking his consent in writing in advance. Please examine keeping in view of the provisions of the IBC Code that whether the COC can remove the RP by passing a resolution with fifty five per cent voting shares.

(5 marks)

OR (Alternate question to Q. No. 6)

Question 6A

(i) Discuss on the provisions of Management of affairs of corporate debtor during the pre-packaged insolvency resolution, also brief the powers of Committee of Creditors in vesting the Management of Corporate Debtor in pre-packaged insolvency resolution process.

(ii) "The Objective of SARFAESI Act and the Insolvency and Bankruptcy Code, 2016 are altogether different and cannot be interchangeable." Examine the statement highlighting the prime objects of both Acts.

(iii) Insolvency Professional Agencies (IPAs) play a crucial role in regulating and educating Insolvency Professionals'. Elucidate the functions of the IPAs as enshrined in the Code.

(5 marks each)

Answer 6 (a)

In the decided case of *Indiabulls Housing Finance Limited V/s Shree Ram Urban Infrastructure Limited,* the winding up proceedings against the corporate debtor had already been initiated by the Bombay High Court. Further, the fresh application for insolvency proceedings has been filed with NCLT Mumbai bench, which in turn had dismissed the application as the same was not maintainable in view of the fact that Hon'ble Bombay High Court already initiated the winding up proceedings. The corporate debtor appealed before National Company Law Appellate Tribunal and the tribunal examined the judgments and opined that once second stage i.e. liquidation (winding-up) proceedings has already been initiated, the question of reverting back to the first stage of Corporate Insolvency Resolution Process or preparation of Resolution Plan does not arise.

While arriving at its judgment, the NCLAT relied on the case of *Forech India Pvt. ltd. vs. Edelweiss assets reconstruction Company Ltd. & Aanr.,* wherein the tribunal observed that if a Corporate insolvency resolution has started or on failure, if liquidation proceeding has been initiated against the Corporate debtor, the question of entertaining another application under Section 7 or Section 9 against the same very Corporate debtor does not arise, as it is open to the 'Financial Creditor and the 'Operational Creditor' to make claim before the Insolvency Resolution Professional/Official Liquidator.

However, the matter went on appeal before the Hon'ble Supreme Court which declared by its judgment that the proceedings under Section 7 or 9 of the Code are independent proceedings and shall remain unaffected by the winding-up proceedings of the Companies Act.

Thus, based on the above judgement given by Hon'ble Supreme Court, application filled by Ritu Housing Finance Company Limited under section 7 of the IBC code is maintainable.

Answer 6(b)

As per section 3(12) of Insolvency and Bankruptcy Code, 2016 the term "default" means non-payment of debt when whole or any part or instalment of the amount of debt has become due and payable and is not repaid by the debtor or the corporate debtor, as the case may be.

Further, SARFAESI Act defines term “default” as

I. non-payment of any debt or any other amount payable by the borrower to any secured creditor consequent upon which the account of such borrower is classified as non-performing asset in the books of account of the secured creditor; or

II. non-payment of any debt or any other amount payable by the borrower with respect to debt securities after notice of ninety days demanding payment of dues served upon such borrower by the debenture trustee or any other authority in whose favour security interest is created for the benefit of holders of such debt securities.

The SARFAESI Act, 2002 has empowered the Banks and Financial Institutions with vast power to enforce the securities charged to them and the purpose of this Act is to enable and empower the secured creditors to take possession of their securities and to deal with them without the intervention of the court. One of the objectives of SARFAESI Act is to provide a mechanism for banks and other financial institutions to recover secured assets.

On the other hand, the purpose of Insolvency & Bankruptcy Code, 2016 is to offer a market-directed, time-bound mechanism to resolve insolvency and run the corporate debtor as a going concern, wherever possible, or exit, where required. The IBC deals with the reorganization and insolvency resolution of corporate debtors (CDs), partnership firms, and even individuals. The IBC also provides an exit mechanism for a corporate person that has not defaulted, through a voluntary liquidation process.

The statement given in the question is correct as the objectives of both Acts are different and term ‘default’ is required to be read with the purpose of both Acts in relevant context.

Answer 6 (c)

As per Section 27 of the Insolvency & Bankruptcy Code 2016:

(1) Where, at any time during the corporate insolvency resolution process, the committee or creditors is of the opinion that a resolution professional appointed under section 22 is required to be replaced, it may replace him with another resolution professional in the manner provided under this section.

(2) The committee of creditors may, at a meeting, by a vote of sixty-six per cent of voting shares, resolve to replace the resolution professional appointed under section 22 with another resolution professional, subject to a written consent from the proposed resolution professional in the specified form.

(3) The committee of creditors shall forward the name of the insolvency professional proposed by them to the Adjudicating Authority.

(4) The Adjudicating Authority shall forward the name of the proposed resolution professional to the Board for its confirmation and a resolution professional shall be appointed in the same manner as laid down in section 16.

(5) Where any disciplinary proceedings are pending against the proposed resolution professional under sub-section (3), the resolution professional appointed under section 22 shall continue till the appointment of another resolution professional under this section.

Hence, approval of 66% voting rights shares of CoC is required for replacing the resolution professional. So, Mr. B cannot be removed as RP with CoC passing resolution constituting 55% voting shares.

OR (Alternate question to Q. No.6)

Answer 6A(i)

Section 54H of the Insolvency & Bankruptcy Code, 2016 provides following provisions with respect to the management of affairs of corporate debtor during the pre-packaged insolvency resolution process period-

a) the management of the affairs of the corporate debtor shall continue to vest in the Board of Directors or the partners, as the case may be of the corporate debtor, subject to such conditions as may be specified:

b) the Board of Directors or the partners, as the case may be, of the corporate debtor, shall make every endeavor to protect and preserve the value of the property of the corporate debtor, and manage its operations as a going concern; and

c) the promoters, members, personnel and partners, as the case may be, of the corporate debtor, shall exercise and discharge their contractual or statutory rights and obligations in relation to the corporate debtor, subject to the provisions of this chapter and such other conditions and restrictions as may be prescribed.

Section 54J of the Insolvency & Bankruptcy Code, 2016 prescribe the following provisions in respect to power of CoC in vesting management of corporate debtor with resolution professional:

(1) Where the committee of creditors, at any time during the pre-packaged insolvency resolution process period, by a vote of not less than sixty-six per cent of the voting shares, resolves to vest the management of the corporate debtor with the resolution professional, the resolution professional shall make an application for this purpose to the Adjudicating Authority, in such form and manner as may be specified.

(2) On an application made under sub-section (1), if the Adjudicating Authority is of the opinion that during the pre-packaged insolvency resolution process—

(a) the affairs of the corporate debtor have been conducted in a fraudulent manner; or

(b) there has been gross mismanagement of the affairs of the corporate debtor,

It shall pass an order vesting the management of the corporate debtor with the resolution professional.

Answer 6A(ii)

The SARFAESI Act, 2002 has empowered the Banks and Financial Institutions with vast power to enforce the securities charged to them and the purpose of this Act is to enable and empower the secured creditors to take possession of their securities and to deal with them without the intervention of the court. One of the objectives of SARFAESI Act is to provide a mechanism for banks and other financial institutions to recover secured assets.

On the other hand, the purpose of Insolvency & Bankruptcy Code, 2016 is to offer a market-directed, time-bound mechanism to resolve insolvency and run the corporate debtor as a going concern, wherever possible, or exit, where required. The IBC deals with the reorganization and insolvency resolution of corporate debtors (CDs), partnership firms, and even individuals. The IBC also provides an exit mechanism for a corporate person that has not defaulted, through a voluntary liquidation process.

The Insolvency and Bankruptcy Code lays down the following key objectives:

1. To consolidate and amend the laws relating to re-organisation and insolvency resolution of corporate persons, partnership firms and individuals to provide for a time bound insolvency resolution mechanism.
2. To ensure maximisation of value of assets.
3. To promote entrepreneurship,
4. To increase availability of credit.
5. To balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues, and
6. To establish an Insolvency and Bankruptcy Board of India as a regulator' body,
7. To provide procedure for connected and incidental matters.

Therefore, the statement given in the question is correct in the light of the objectives of both the SARFAESI Act, 2002 and the IBC, 2016 which are altogether different and cannot be interchangeable.

Answer 6A (iii)

As per Section 3(20) of the Insolvency and Bankruptcy Code, 2016, Insolvency Professional Agency" means any person registered with the Board under section 201 as an insolvency professional agency.

Insolvency Professional Agencies are designated to regulate Insolvency Professionals. These agencies enroll Insolvency Professionals, provide pre-registration educational course to its enrolled members and enforce a code of conduct for their functioning. They also issue 'authorisation for assignment' to the IPs enrolled with them.

In exercise of powers conferred by the Insolvency and Bankruptcy Code, 2016, the Insolvency and Bankruptcy Board of India (IBBI) has framed the following regulations to regulate the working of Insolvency Professional Agencies (IPAs):

- The Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016, and
- The Insolvency and Bankruptcy Board of India (Insolvency Professional Agencies) Regulations. 2016.

According to Section 204 of the Code, insolvency professional agencies perform the following functions, namely:

a) grant membership to persons who fulfil all requirements set out in its byelaws on payment of membership fee:

b) lay down standards of professional conduct for its members;

c) monitor the performance of its members;

d) safeguard the rights, privileges and interests o I insolvency professionals who are its members;

e) suspend or cancel the membership of insolvency professionals who are its members on the grounds set out in its bye-laws:

f) redress the grievances of consumers against insolvency professionals who are its members; and

g) publish information about its functions, list of its members, performance of its members and such other information as may be specified by regulations.

***

RESOLUTION OF CORPORATE DISPUTES, NON-COMPLIANCES AND REMEDIES

Time allowed : 3 hours *Maximum marks : 100*

Total number of questions : 6

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

Question 1

(a) *Arjun, purchased an open land for ₹ 6 crore on July 15, 2020, through registered sale deed from Alpha Enterprises Ltd, seller of the property. Subsequently, development happened on that land at fast pace and buildings were also constructed and many units were sold to new purchasers. Out of constructed 302 units, third party interest was created for 61 units and it was transferred to the purchasers. No objection certificate for another 14 purchasers was received by the private bank. Rupan, claiming to be one of the shareholder of the Alpha Enterprises Ltd filed an application under Section 241, 242 of the Companies Act, 2013, before NCLT on allegation of oppression and mismanagement in Alpha Enterprises Ltd. NCLT upon considering the application, issued interim order on Arjun "to maintain status quo relating to remaining 227 units by not creating any third party interest and not to carry on work construction beyond 302 units till disposal of case."*

Aggrieved by the interim order, Arjun filed an appeal against the order, pleading that being purchaser of the land in question, he was not related in any manner to Rupan and by the impugned order, he has been restrained from proceeding further with transferring/executing sale deed in respect of remaining constructed units, which has been constructed much after purchase of the land.

In the light of judicial pronouncement, comment whether Arjun's appeal would be allowed.

(5 marks)

(b) *Gulababad Industries Association (GIA) is a society registered under the Societies Registration Act 1860, with members primarily involved in a variety of industries including steel, alloys, medical devices etc. Amar Gas Ltd. (AGL) is a company engaged in the business of setting up of distribution network in various cities for supplying natural gas to industrial, commercial and domestic customers. It would purchase natural gas from GAIL (Gas Authority of India Ltd) and supply them in the Gulababad market. GIA alleged that the terms of Gas Supply Agreement (GSA) are biased and one-sided, without any scope, who were solely dependent on Amar Gas for the supply of natural gas. The case came up before the Competition Commission of India (CCI) based on the information filled by the GIA, alleging contravention of Section 4 of the Competition Act, 2002. GIA is an association of industries, whose members consume natural gas supplied by AGL. The primary allegations against AGL were that it was abusing its dominance in the relevant market of 'supply and distribution of natural gas in Gulababad' by incorporating unconscionable and one-sided terms in the Gas Supply Agreement (GSA).*
Finding a prima facie case, the CCI directed the Director General (DG) to investigate the matter. The DG Report concluded that various clauses of the GSA hinted towards abuse of dominance by AGL. This was challenged by AGL before NCLAT. In the light of judicial pronouncement, comment whether the appeal will be allowed.

(5 marks)

(c) *PQR Chits and Finance Ltd issued cheques to 150 depositors, while refunding their matured deposits with interest. All the cheques issued by the Company were dishonoured by the bankers of the Company, as those cheques are not issued by the bank to the Company for use. Around 20 of these depositors, made written complaint to the local police against the Company, seeking action. They also approached the Company, informing about their complaint to the police for dishonour of the cheques. The Company contended that the state police has no role to play in such matters, as it is a company law matter. Under such scenario, what is the remedy available to these depositors ?*

(5 marks)

(d) *Soman, had completed MBA in Finance and worked with a multinational company in its Treasury department. He was intrigued by the forex operations and wanted to pursue a career in that forex and treasury management. After two years, he joined Fundex, a money changer firm with branches in all major cities in India. Having good experience and contacts, he wanted to start off something on his own and started a business as money changer firm, dealing in foreign currencies by acquiring, exchanging them on need basis, converting the foreign currency into Indian rupees. He handled all his operations, through physical exchange of currency, without getting involved in any banking transaction through his known sources. He did not maintain any records for his transactions and was sure that they would not be known to any regulatory agency. However, he was arrested and prosecuted by an Assistant Director of Enforcement Directorate, as all his transactions amounted to contravention of FEMA. Despite various searches and inquires, the quantum of amount involved in his dealings could not be ascertained as he had not maintained proper records. Under these circumstances, explain how the Adjudicating Authority can proceed in this matter.*

(5 marks)

Answer 1(a)

The facts of the given situation are similar to the case *Galaxy Enterprise V/s Indiraben and Ors*.

The summary of the National Company Law Appellate Tribunal (NCLAT) order is as below:

NCLAT observed that – In view of facts and circumstances which has emerged from the record as well as on the basis of argument advanced by the party it is not in dispute that in respect of the open land, a registered sale deed was executed after receipt of payment of total consideration. It is also not reflected as to any question was raised that the appellant had not purchased the land in good faith, rather the transaction appears to have been done in good faith by the appellant. It is also not disputed that the:

(i) sales deed was registered on 13.07.2020

(ii) the pleading that after registration permission was obtained from competent authority for construction of the building

(iii) approval of the plan and mortgaging of the land for obtaining loan

(iv) thereafter almost completion of the project by way construction of above 302 units

(v) creations of 3rd party right since 61 person had already purchased the unit and

(vi) NOC for another 14 purchasers from the Bank was received.

In such a situation, it was not permissible for the National Company Law Tribunal (NCLT) to pass an order affecting the right of the appellant as well as the persons who were neither arrayed as party in petition before NCLT nor they noticed.

On perusal of the language of the interim relief order, it is evident that the applicant was under impression as if some construction on land was going to be done by the applicant herein whereas facts noticed hereinabove makes it clear that construction over the land was almost complete and some of the third party right was also created. Such circumstances are sufficient to draw an inference that balance of convenience was completely against the applicant and in absence of balance of convenience of the learned, NCLT has committed an error in passing the order of *status quo* restraining appellant from either creating any 3rd party right or carrying any construction work. If we allow *status quo* order to continue, there is every possibility of irreparable loss to the appellant and also some other proposed purchasers who has entered into agreement for purchasing the units in the premises in question which has been constructed over the land.

Hence, we are of the opinion that in view of the fact and circumstances that impugned order is here by set aside. Hence, the appeal stands allowed.

In view of the above, it can be said that appeal by Arjun before NCLAT would be allowed.

Answer 1(b)

The facts of the given situation are similar to the case *M/s Adani Gas Limited vs. CCI and Ors*. The facts of the case as under:

In this case, National Company Law Appellate Tribunal (NCLAT/Appellate Tribunal) found Adani Gas Limited's (AGL) Gas Supply Agreement (GSA) imposed unfair conditions on the industrial customers of Faridabad. NCLAT commented that AGL, being the only supplier of natural gas and there being no gaseous substitute for the same, AGL abused its dominant position qua the Industrial Customers by imposing unfair conditions upon the buyers under GSA as it existed in original form.

Appeals were accordingly disposed of upholding the impugned order passed by the Commission holding AGL guilty of abuse of dominant position with the orders and directions passed by the Commission with modification in imposition of penalty on AGL. The NCLAT observed that the GSA that had been revised by AGL during the course of investigation and inquiry before the Commission came up for further revision of the contravening clauses to make them more consumer friendly and to protect the interests of Industrial Consumers by removing disparity as regards the revision of gas prices, payment, obligations in case of shutdown of supply and for complete or partial off-take of gas, etc. which came about in compliance to the suggestions put forth by this Appellate Tribunal. The Tribunal also observed that the modifications which in effect eliminated discrimination *qua* Industrial Consumers and the subsequent emergence of competitors of natural gas on the scene coupled with the fact that AGL not only came up with a voluntary revision of GSAs even before the conclusion of inquiry by the Commission and was amenable to the advice/suggestions falling from Appellate Tribunal resulting in the incorporation of the consumer-friendly clauses substituting the contravening provisions in the GSAs, in Appellate Tribunal's considered opinion carved out mitigating factors / extenuating circumstances in favour of AGL outweighing the only aggravating factor *i.e*, abuse of dominant position.

The NCLAT further opined that reducing the penalty imposed on Adani Gas Limited would be commensurate with and proportionate to the level of proved abuse conduct

of AGL and also opined that this reduction would meet the ends of justice and achieve the desired object of the statute in the peculiar facts and circumstances of the case.

In the given situation, based on above judicial pronouncement, it can be said that the appeal as filed by Amar Gas Limited is not likely to be allowed.

Answer 1(c)

The given situation has relevance to the economic offence committed by the company by misusing the forged cheques of the bank to defraud the depositors which amounts to financial fraud. The purpose of the Economic Offences Wing (EOW) is to prevent, detect and investigate cases of economic, cyber and Intellectual Property related crimes to ensure prompt justice and desired relief to the victims.

Economic Offence Wings are specialized wings of state police to handle investigation of economic offences. Economic and financial offences cover fraud, forgery and counterfeiting, offences against the legislation governing cheques (in particular forgery or use of stolen cheques), forgery or use of credit cards, undeclared employment, and offences against companies (such as misuse of company assets).

Being a specialized wing of the state Police to deal with important cases concerning multi- level-marketing frauds, share market frauds, multi-victim frauds, foreign trade related frauds, land and building rackets, offences of forgery, cheating by individuals and Non-Banking Financial Companies, cyber-crimes, offences related to Intellectual Property Rights and such like cases.

Thus the depositors may file complaint against the Company before the Economic Offences Wing of the State Police.

Answer 1(d)

As per section 13(1) of Foreign Exchange Management Act, 1999(the Act), if any person contravenes any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank of India, he shall, upon adjudication, be liable to a penalty up to thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day after the first day during which the contravention continues.

Further, as per section 13(1A) of the Act if any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A, he shall be liable to a penalty up to three times the sum involved in such contravention and confiscation of the value equivalent, situated in India, the foreign exchange, foreign security or immovable property.

As per section 13(1B), if the Adjudicating Authority, in a proceeding under sub-section (1A) deems fits, he may, after recording the reasons in writing, recommend for the initiation of prosecution and if the Director of Enforcement is satisfied, he may, after recording the reasons in writing, may direct prosecution by filing a Criminal Complaint against the guilty person by an officer not below the rank of Assistant Director.

As per section 13(1C), if any person is found to have acquired any foreign exchange, foreign security or immovable property, situated outside India, of the aggregate value exceeding the threshold prescribed under the proviso to sub-section (1) of section 37A, he shall be, in addition to the penalty imposed under sub-section (1A), punishable with imprisonment for a term which may extend to five years and with fine.

As per section 13(2) of the Act, any Adjudicating Authority adjudging any contravention under sub-section (1), may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any, of the persons committing the contraventions or any part thereof, shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf.

For the purposes of this sub-section, property in respect of which contravention has taken place, shall include: (a) deposits in a bank, where the said property is converted into such deposits; (b) Indian currency, where the said property is converted into that currency; and (c) any other property which has resulted out of the conversion of that property.

The Adjudicating Authority may accordingly confiscate the foreign currency or the Indian currency seized or any other property as may have been resulted out of the said currency, besides levying the penalty prescribed under Section 13 as aforesaid.

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

Question 2

(a) Raghupathy (Petitioner) filed a complaint against Roshesh and Raj (accused) alleging that both of them induced him to become consignment agent of their Company, for supply of medicines in south Kerala region. On their inducement, Raghupathy deposited a sum of ₹ 15 Lakh as security deposit, for which he was promised an interest of 18% per annum by Roshesh. He further promised to pay 5% commission on total sale in south Kerala region and else agreed to give commission on indirect sale made by him. An agreement was executed, wherein he was appointed as a consigneeagent of the Company for south Kerala, for a period of five years. Thereafter, there was regular supply of stocks for next one year but after one year, they dishonestly stopped supplying medicines, though Roshesh sold medicines worth about ₹ 40 lakh in south Kerala region through Raj, in violation of the agreement. This caused Raghupathy a loss of ₹ 5 Lakh on account of illegal retention of the commission and security money. Roshesh did not give interest on the security deposit. Raghupathy also alleged that Roshesh and Raj, had dishonest and fraudulent intention to deceive him by cheating; and that had they not made false representation, he would not have given money to them. In background of judicial pronouncement, comment whether criminal prosecution can be raised against Roshesh and Raj.

(4 marks)

(b) An offence under Companies Act, 2013 was compounded by RST Ltd and compounding order was issued by the compounding authority specially for offences by the Company and the Directors of the Company as officer in default. Company has paid the compounding fee. After the payment, compounding authority came across certain facts about the offence. If those facts had surfaced at the time of deciding compounding fee, compounding authority would have levied higher fee. Since suppression of fact was higher, compounding authority re-opened the matter and revised the compounding fee and asked Company to pay the differential. Evaluate tenability of action of the compounding authority, in the light of the judicial pronouncement.

(4 marks)

(c) *The Board of Directors of Gama Ltd, a listed company appointed Reyon, as an Executive Director at the Board meeting held on June 1, 2023. The Company took up this appointment of Reyon, for approval of the shareholders at its Annual General Meeting (AGM) held on September 29, 2023, but the same was not approved by the shareholders. However, he was appointed as an additional director on whole time employment by the Board at its meeting held on September 30, 2023 by passing a resolution to hold the office of directorship till the conclusion of the next AGM, to be held for the year 2024. Is appointment of Reyon as an additional director, by the Board justified ?*

(4 marks)

(d) *Kabir, aged 17 years, has been arrested for laundering a sum of ₹ 51 Lakh as, it is a cognizable and non-bailable offence punishable, with a term of imprisonment for more than three years under the Prevention of Money Laundering Act, 2002. He proceeded for bail before the Court, stating that he is a minor and bail can be granted. State whether he would succeed.*

(4 marks)

OR (Alternate question to Q. No. 2)

Question 2A

(i) *The Central Government ordered investigation of the ownership of Pious Ltd and sent notice to the Company and its directors. Against this, the Managing Director, on behalf of the Company replied that, the order of investigation was not made based on a court or Tribunal order and hence it is not valid. Is the contention of the Managing Director correct ?*

(4 marks)

(ii) *Gupta Traders Private Ltd. had 5 shareholders, who were brothers holding 2500 shares each. Total share capital of the Company is 12500 of ₹10 each. Their names were AK Gupta, BK Gupta, CK Gupta, DK Gupta and HK Gupta. Articles of the Company provided that they shall be permanent directors and will not be liable to retire by rotation. After 3 years, RK Gupta, son of AK Gupta was inducted into the company. Except BK Gupta, all 4 brothers parted with 500 shares each in favor of RK Gupta. RK Gupta thereby became, along with his father and uncles, holder of 2000 shares. BK Gupta continued to hold 2500 shares. After one year, CK Gupta died and by this time dispute amongst the brothers had gathered full momentum. BK Gupta filed a petition against AK Gupta and RK Gupta that control of the Company has been assumed by both of AK Gupta and RK Gupta and Company's affairs are being mismanaged and are being conducted in a manner which is prejudicial to the company's interests. He also alleged that company is not maintaining statutory books at registered office and there is no maintenance of asset register or records in the Company. Company is not holding board meetings thereby suppressing minority shareholders' rights. In light of judicial pronouncement, comment whether BK Gupta's arguments are tenable.*

(4 marks)

(iii) *OCPM Ltd has been compounded by RBI's order for the offences committed by the Company under FEMA on January 31, 2022. The Company has preferred an appeal against this order on March 1, 2022. The Company has again committed a similar contravention on March 2, 2022. Can RBI initiate compounding process for this subsequent violation separately ?*

(4 marks)

(iv) *Pragya, Aarav and Aryan, a GST inspector, Railway officer and Customs officer (Joint Commissioner) respectively in the implementation of GST laws, seized goods from godown of Nitin, a trader, after following all the protocols as defined under GST laws and regulations. Godown was raided and goods were seized on April 1, 2022. After effecting seizure, they did not issue any notice to this effect to Nitin till December 31, 2022. Nitin filed a complaint against the occurrence of the event (including raid and seizure) stating that personnel involved in the raid were officers from Railways and Customs and have no authority to seize goods and hence the raid was prima facie illegal and the goods must be returned immediately. Is Nitin's contention valid ?*

(4 marks)

Answer 2(a)

The facts of the given situation are similar to the case *Shruti Enterprises v. State of Bihar and ors.*

In this case**,** it was held that mere breach of contract cannot give rise to criminal prosecution under section 420 unless fraudulent or dishonest intention is shown right at the beginning of transaction when the offence is said to have been committed.

If it is established that the intention of the accused was dishonest at the time of entering into the agreement, then liability will be criminal and the accused will be guilty of offence of cheating. On the other hand, if all that is established is that a representation made by the accused has subsequently not been kept, criminal liability cannot be fastened on the accused and the only right which complainant acquires is to a decree of damages for breach of contract.

The complaint petition in this case shows that after the execution of the agreement, Roshesh and Raj regularly supplied the medicines for next 1 year and Raghupathy had no grievance till then. It indicates that intention of Roshesh and Raj was not dishonest or fraudulent at the time when the parties entered into the agreement. As the discontentment and issue arose subsequently since the opposite party did not keep their promise, their action is not liable to be deemed criminal going by the judgement passed in the case referred here.

In view of the above, it can be said that, even if the entire facts disclosed in the complaint petition are taken to be true; no offence under Section 420/34 of Indian Penal Code, 1860 can be made out against Roshesh and Raj as it is a case of breach of contractual obligation.

Answer 2(b)

It is well settled principle that once an offence is compounded, penalty or prosecution proceeding cannot be taken for same offence. *(PP Varkey V. STO)*

In the case *S Vishwanathan v*. *State of Kerala,* it was held that once the matter is compounded, neither department nor assesse can challenge the compounding order. Department cannot reopen the matter on the reason that actual suppression was much higher.

In the given situation, action of Compounding Authority will not be tenable with respect to offence already compounded, as the order is passed and compounding fees has been paid by RST Ltd. Accordingly, the Compounding Authority has no authority to undo the whole process of compounding even if they come to know that suppression of fact was higher while deciding compounding fee, unless the additional facts revealed at the later stage indicates occurrence of some offence other than the once already compounded.

Answer 2(c)

According to section 161(1) of the Companies Act, 2013, the articles of a company may confer on its Board of Directors the power to appoint any person, other than a person who fails to get appointed as a director in a general meeting, as an additional director at any time who shall hold office up to the date of the next annual general meeting or the last date on which the annual general meeting should have been held, whichever is earlier.

As per the provisions of regulation 17(1C) of the SEBI (LODR) Regulations, 2015, a listed entity shall ensure that approval of shareholders for appointment of a person on the Board of the company as a director or as a manager is taken at the next general meeting or within a time period of 3 months from the date of appointment, whichever is earlier.

However, according to the 1st proviso to regulation 17(1C), a public sector company shall ensure that the approval of the shareholders for appointment or re-appointment of a person on the Board of Directors or as a Manager is taken at the next general meeting.

Further the 2nd proviso to regulation 17(1C) provides that the appointment or a re-appointment of a person, including as a managing director or a whole-time director or a manger, who was earlier rejected by the shareholders at a general meeting, shall be done only with the prior approval of shareholders.

Conclusion

According to regulation 17(1C), a listed entity shall ensure that approval of shareholders for appointment of a person on the Board of the company as a director or as a manager is taken at the next general meeting or within a time period of 3 months from the date of appointment, whichever is earlier. Therefore, the approval was required to be obtained within a period of 3 months from June 1, 2023 which was not taken by the Gama Ltd. However, if Gama Ltd. is a Public Sector Company, the approval can be taken in the AGM held on September 29, 2023 in view of the 1st Proviso to regulation 17(1C).

Further, according to 2nd proviso of regulation 17(1C), the appointment or a re-appointment of a person, including as a managing director or a whole-time director or a manger, who was earlier rejected by the shareholders at a general meeting, shall be done only with the prior approval of shareholders. Since, continuation of the original appointment of Reyon was not approved by the shareholders in AGM held on September 29, 2023, the appointment in the Board Meeting held on September 30, 2023 is not valid in light of the 2nd proviso to Regulation 17(1C).

Answer 2(d)

Section 45 of the Prevention of Money Laundering Act, 2002 provides that the offences under the Act shall be congnizable and non-bailable, notwithstanding anything contained in the Code of Criminal Procedure, 1973, no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule, shall be released on bail or on his own bond unless-

i. The Public Prosecutor has been given an opportunity to oppose the application for such release and

ii. Where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

In case of any person who is under the age of 16 years or in case of woman or in case of a sick or infirm or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees, the Special Court can direct the release of such person on bail.

Since, Kabir is not a woman and he is above the age of 16 years, he cannot be released on bail on the ground that he is a minor. However, considering the threshold of Rs. 1 crore and above for money-laundering accusation, he can be released on bail by the Special Court as the amount involved herein is Rs 51 lacs which is well below Rs 1 crore.

Answer 2A(i)

According to section 216(1) of the Companies Act, 2013(the Act), where it appears to the Central Government that there is a reason so to do, it may appoint one or more inspectors to investigate and report on matters relating to the company, and its membership for the purpose of determining the true persons:

(a) who are or have been financially interested in the success or failure, whether real or apparent, of the company; or

(b) who are or have been able to control or to materially influence the policy of the company; or

(c) who have or had beneficial interest in shares of a company or who are or have been beneficial owners or significant beneficial owner of a company.

Further section 216(2) of the Act, without prejudice to its powers under sub-section (1), the Central Government shall appoint one or more inspectors under that sub-section, if the National Company Law Tribunal, in the course of any proceeding before it, directs by an order that the affairs of the company ought to be investigated as regards the membership of the company and other matters relating to the company, for the purposes specified in sub-section (1).

According to section 216(3) of the Act, while appointing an inspector, the Central Government may define the scope of the investigation, whether as respects the matters or the period to which it is to extend or otherwise, and in particular, may limit the investigation to matters connected with particular shares or debentures.

In view of the provision of section 216 mentioned above, it can be said that the contention of the Managing Director is not correct as the investigation pertains to ownership of the Company.

Answer 2A(ii)

In the case *Chandra Krishna Gupta* v. *Pannalal Girdhari Lal* Pvt. *Ltd,* it was held that "The non- maintaining of the assets' register or records cannot amount to acts of oppression being committed on minority shareholders. Similarly, non-maintaining of statutory books at the registered office may attract evil consequences to the directors and may also, in certain circumstances amount to an act of mismanagement but under no circumstances, can it be regarded as an act of oppression".

“The non-holding of the meetings of the Board would not amount to oppression of minority shareholders. The rights of the petitioner as a director might have been affected but his rights as a minority shareholder have not been affected thereby.”

The given situation is similar to the above mentioned case, applying this milestone decision to the case, it can be concluded that BK Gupta's argument for oppression of minority rights may not be correct, though point relating to mismanagement may be tenable.

Answer 2A(iii)

According to Rule 5(2) of Foreign Exchange (Compounding Proceedings) Rules, 2000(the rules), a contravention committed by any person within a period of three years from the date on which a similar contravention committed by him was compounded under these rules cannot be compounded.

However, any second or subsequent contravention committed after the expiry of a period of three years from the date on which the contravention was previously compounded shall be deemed to be a first contravention and can therefore be compounded.

Further, as per rule 11 of the rules, no contravention shall be compounded if an appeal has been filed under section 17 or section 19 of Foreign Exchange Management Act, 1999.

In view of these provisions, RBI cannot initiate compounding process for the subsequent violation separately as the time limit of 3 years has not been completed.

Answer 2A(iv)

According to Section 72(1) of the Central Goods and Services Tax Act, 2017(the Act), all officers of Police, Railways, Customs and those officers engaged in the collection of land revenue including village, officers, officers of state tax and officers on union territory tax shall assist the proper officers in the implementation of the Act.

According to Section 72(2) of the Act, the Government may, by notification, empower and require any other class of officers to assist the proper officers in the implementation of this Act when called upon to do so by the Commissioner.

According to Section 67(7) of the Act, where any goods are seized under section 67(2) and no notice in respect thereof is given within six months of the seizure of the goods, the goods shall be returned to the person from whose possession they were seized.

From the above provision, it is clear that Pragya, Aryan and Aarav should return back the seized goods immediately to Nitin as time limit of 6 months is already over to issue notice in respect thereof.

Further, keeping in view of above provisions, Nitin's allegation in this question on "illegal raid" is not valid.

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

Question 3

(a) ‘Complainant has no legal or vested right to withdraw a complaint as and when he wishes.’ Elucidate.

(b) ‘Preference shareholders can make an application to Tribunal for relief in case of oppression and mismanagement, but not debentureholders’. Comment.

(c) ‘Certain regulatory powers of RBI have been changed and are not applicable to International Financial Services Centres.’ Explain.

(d) ‘Risk management and Crisis management are separate’. Elaborate.

(4 marks each)

OR (Alternate question to Q. No. 3)

Question 3A

Write short notes on :

(i) Importance of appeal

(ii) Professional indemnity insurance and its exclusions

(iii) Protection of employees under Section 218 of Companies Act, 2013

(iv) Summons case and warrants case

(4 marks each)

Answer 3(a)

Withdrawal of complaint

Section 257 of the Code of Criminal Code, 1973 (CrPC) lays down the circumstances under which a complaint may be withdrawn with the consent of the Court in a summons case. It permits a complainant, at any time before a final order is passed in any case, to withdraw, with the permission of the Magistrate, his complaint against the accused, or if there be more than one accused, against all or any of them provided he satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint and the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused against whom complaint is so withdraw.

On a bare reading of this section, therefore, it can be manifested that a complainant has no absolute vested right to withdraw a complaint as and when he wishes, and the same is subject to section 257. Withdrawal of the complaint under section 257 of CrPC is permissible only if the Magistrate is satisfied that there are sufficient grounds for permitting such withdrawal. This clearly implies that the Magistrate must apply his judicial mind to the reason, which compels the complainant to withdraw the complaint, before granting permission.

Answer 3(b)

As per sec 241(1) of the Companies Act, 2013 members of the Company, having the minimum rights specified under Sec 244, may file a complaint before the Tribunal under section 241 seeking appropriate relief in cases of oppression.

Position of Preference shareholder: A preference shareholder is also a member as per definition of member in sub-clause (iii) of clause (55) of Section 2 of the Companies Act, 2013. Hence, a member holding preference shares can make an application to tribunal for relief in cases of oppression and mismanagement.

Position of Debenture holder: The definition of member does not include debenture holders either holding convertible instruments or not, hence he can't apply to Tribunal under to protect his interest. Debenture holder being creditors, as per terms of contract, and to protect their interest they have to invoke other remedies available to them.

Answer 3(c)

By virtue of section 33 of the International Financial Services Centres Authority Act, 2019, section 44A has been inserted in the Foreign Exchange Management Act, 1999, thereby excluding the powers exercisable by Reserve Bank of India under Foreign Exchange Management Act, 1999, in respect of International Financial Services Centre and entrusting the said powers to International Financial Services Centres

Authority in so far as regulation of financial products, financial services and financial institutions that are permitted in the International Financial Services Centres.

As per the amended section 44A of the Foreign Exchange Management Act, 1999, the powers exercisable by the Reserve Bank of India -

(a) shall not extend to an International Financial Services Centre set up under section 18(1) of the Special Economic Zones Act, 2005;

(b) shall be exercisable by the International Financial Services Centres Authority established under section 4(1) of the International Financial Services Centres Authority Act, 2019, in so far as regulation of financial products, financial services and financial institutions that are permitted in the International Financial Services Centres are concerned.

Answer 3(d)

Risk management, also known as Enterprise Risk Management ("ERM"), is a systematic and holistic approach for firms to address all their risks, whether operational, strategic or financial, comprehensively. ERM focuses on identifying risks, developing and monitoring a risk management system and reacting to risk events, when they occur. As ERM is a firm wide effort to manage all the firm's risks, involvement by the company's board of directors and senior management is imperative. In India, both the Companies Act, 2013 and the Listing Guidelines view risk management practices as one of the fundamental functions of the board of directors. Beginning in the mid-1980s, the Committee of Sponsoring Organizations of the Treadway Commission (COSO), initially formed in part to study fraudulent financial reporting, began to articulate a risk management framework. In 2004, following several corporate governance scandals around the world, COSO issued a detailed report defining ERM as "*… a process, effected by an entity's board of directors, management and other personnel, applied in strategy setting and across the enterprise, designed to identify potential events that may affect the entity, and manage risks to be within its risk appetite, to provide reasonable assurance regarding the achievement of entity objectives.*" The COSO approach presents eight interrelated components of ERM:

- internal environment (the tone of the organization),
- setting objectives,
- event identification,
- risk assessment,
- risk response,
- control activities,
- information and communications, and
- monitoring

The significance of ERM can be seen in the value it creates when effectively implemented and the value it destroys when there are shortcomings in leadership and implementation.

Case Study: BP's deep water oil spill

On April 20, 2010, an explosion at BP's offshore oil drilling rig caused by a blowout resulted in the death of 11 people and ignited a fireball that continued for 36 hours until the rig sank. This left the well gushing at the seabed for 87 days, resulting in the largest oil spill in U.S. waters and devastating the economy and coastline in the Gulf of Mexico Region. BP itself suffered considerably as a result of the spill; criminal and civil

settlements to date have cost the company tens of billions of dollars. The accident was not a first for BP which only 5 years previously had sustained a deadly explosion at a Texas refinery. Several investigative reports generated after the 2005 explosion identified significant risk issues including lack of uniform safety culture, lack of effective early warning systems, lack of effective education and training, and inadequate senior management oversight. By the time the deep-water horizon spill occurred 5 years later, BP's board and senior management had still not created systems for addressing many of these issues, according to BP's own accident report in 2010. The failure of the BP Board to implement an effective ERM system, even 5 years after its ERM weaknesses were exposed by the 2005 explosion, demonstrates the Board's shortcomings. BP's ERM failure proved to be disastrous not only for BP, but also for the environment.

Crisis management is the process by which an organization deals with a disruptive and unexpected event that threatens to harm the organization or its stakeholders. Unlike risk management, which involves planning for events that might occur in the future, crisis management involves reacting to negative events during and after they have occurred.

Following the example above in which a company faces a high probability of a flood damage, a back-up system for all computer systems might be created. This way, if a flood occurs that affects the company, it would still have a record of its data and work processes stored. Although business might slow down for a short period of time while the company purchases new computer equipment, business operations would not be completely halted. By having a crisis resolution in place, a company and its stakeholders can prepare and adapt well to sudden, unexpected, and adverse developments.

Crisis can either be self-inflicted or caused by external forces. Examples of external forces that could affect an organization's operations include natural disasters, security breaches, or false information about a company that hurts its reputation. Self-inflicted crises are caused within the organization, such as when an employee smokes in an environment with hazardous chemicals, opens or downloads questionable files on an office laptop, offers poor customer service that goes viral online, or an accounting department cooking the books. Internal crisis can be managed, mitigated, or avoided if a company enforces strict compliance guidelines and protocols regarding ethics, policies, rules, and regulations among employees.

Answer 3A(i)

Importance of Appeal

In an ideal world, a trial decides justice equitably and fairly in accordance with the law. In most cases, this is exactly what happens, but occasionally, a judge or adjudicating authority for whatever reason, makes a mistake or even a serious mistake that results in the miscarriage of justice. Nevertheless, the law also gives a right or rather vests in the aggrieved party a right to appeal to a higher authority to hear the grievance and consider the matter and look into it for re-consideration. Right of appeal is available in all laws and Corporate Laws are no exception. The Companies Act, 2013, Foreign Exchange Management Act, 1999, SEBI Laws, Taxation laws etc. all provide for the right of appeal against the order passed.

Answer 3A(ii)

Professional indemnity insurance

Professional Indemnity Insurance is a type of business insurance, typically for organizations that provide consultation or any professional services to its clients. Professional indemnity insurance covers claims made by the businesses in case their clients have sued them for making them endure any significant financial loss due to

their advices and services. Professional indemnity insurance is also known as professional liability insurance and also as errors & omissions (E&O) in the United States. It is a type of liability insurance that works to protect businesses and individuals who provide consultation and services with the compensation for full and hefty costs arising from the loss that they have caused to their client. The coverage provided by the insurance company focuses on the alleged failure of the service delivery by the company, which has led to the financial loss due to errors and omissions in the service or consultation.

Exclusions of Professional indemnity insurance

Below are some exclusions under the professional indemnity policy copy:

- Contractual Liability: For eg.. A agreed to give maintenance services for the IT Hardware and Software of the Company. He took an insurance policy for the liability under this agreement. This is an exclusion.
- Loss arising directly or indirectly out of the actual, alleged or threatened discharge, dispersal release, seepage or escape of pollutants. For eg. A policy against the liability due to causing Water pollution under the Water (Prevention and Control of Pollution) Act, 1974. This is an exclusion.
- Any claim based upon, arising out of, or attributable to the insolvency or bankruptcy of any insured. For Eg. A policy against the proceedings under Insolvency and Bankruptcy Code, 2016 is an exclusion.
- Any claim based upon, arising out of or attributable to any warranty, guarantee or estimate with respect to fees, costs, quantities, duration or date of completion. For Eg. An insurance extending guarantee for availability of a certain trademark is an exclusion.

Answer 3A(iii)

Section 218 of the Companies Act, 2013 provides that notwithstanding anything contained in any other law for the time being in force, if—

(a) during the course of any investigation of the affairs and other matters of or relating to a company, other body corporate or person under section 210, section 212, section 213 or section 219 or of the membership and other matters of or relating to a company, or the ownership of shares in or debentures of a company or body corporate, or the affairs and other matters of or relating to a company, other body corporate or person, under section 216; or

(b) during the pendency of any proceeding against any person concerned in the conduct and management of the affairs of a company under Chapter XVI, such company, other body corporate or person proposes—

(i) to discharge or suspend any employee; or

(ii) to punish him, whether by dismissal, removal, reduction in rank or otherwise; or

(iii) to change the terms of employment to his disadvantage,

the company, other body corporate or person, as the case may be, shall obtain approval of the Tribunal of the action proposed against the employee and if the Tribunal has any objection to the action proposed, it shall send by post notice thereof in writing to the company, other body corporate or person concerned.

If the company, other body corporate or person concerned does not receive within thirty days of making of application under section 218(1), the approval of the Tribunal, then and only then, the company, other body corporate or person concerned may proceed to take against the employee, the action proposed.

Further, if the company, other body corporate or person concerned is dissatisfied with the objection raised by the Tribunal, it may, within a period of thirty days of the receipt of the notice of the objection, prefer an appeal to the Appellate Tribunal.

The decision of the Appellate Tribunal on such appeal shall be final and binding on the Tribunal and on the company, other body corporate or person concerned.

Answer 3A(iv)

As per section 2(w) of the Criminal Procedure Code, 1973 (CrPC), 'summons-case' means a case relating to an offence, and not being a warrant case. This implies that summons cases are cases relating to offences provided they are not warrant cases. As per section 2(x) of CrPC, 'Warrant- case' means a case relating to an offence punishable with death, imprisonment for a term exceeding two years. In other words if the minimum punishment prescribed by any substantive law for an offence is an imprisonment for a term exceeding two years, the offence will be dealt with as a warrant case. The basis of the classification is the seriousness of the offence to which the case relates. A warrant case relates to a serious offence while a summons case relates to a comparatively less serious offence. It is for the same reason that the trial procedure prescribed for a warrant case is very elaborate when compared to that prescribed for a summons case.

As per CrPC in a summons case a summons is to be issued to the accused in the first instance and in a warrant case a warrant of arrest is normally to be issued for the arrest of the accused. CrPC gives discretion to the Judicial Officer to depart from this general rule if the circumstances so demand in a particular case.

Question 4

(a) State whether the following offences under the Companies Act, 2013 are compoundable. If yes, also mention the compounding authority :

(i) Failure to maintain proper books of account

(ii) Contravention of section 144 by the auditors

(iii) Company secretary in practice certifies the annual return otherwise than in conformity with the requirements of Section 92

(iv) Political contributions in contravention of Section 182.

(4 marks)

(b) Amit is accused for certain offences under SEBI Act, 1992. Accordingly, SEBI ordered him to follow certain direction for the refund of money he made due to his illegal actions in the stock market and imposed penalty for the same. Amit was neither able to refund the money nor able to pay penalty imposed. He has declared to SEBI that after the investigation, he has stopped doing any business and has totally cut off from the stock market. He no more deals in trading of securities. Can SEBI recover the amount from Amit ? Explain.

(4 marks)

(c) Mr. Faron, a declared smuggler in pursuance of an order of detention, has absconded while he was taken into custody. Despite many efforts, he could not be traced by the police and the same has been reported to the Government. Under the situation, explain the further course of action available in this case.

(4 marks)

(d) The Board of Myriad Ltd had taken loans from its Directors and their relatives, thereby contravening the provisions of Section 186 of the Companies Act, 2013. Further it was also found that the directors had diverted these funds for their personal investment in share market. However, the directors had lost all the money they invested and the amount was now not recoverable. Explain the penal provisions that can be enforced against the Directors for such acts.

(4 marks)

Answer 4(a)

(i) The offence failure to maintain proper books of account is compoundable as it is punishable under Section 128(6) only with monetary fine.

The Compounding Authority in this case is Regional Director or any officer authorised by the Central Government.

(ii) If an auditor of a company contravenes provisions of section 144 of Companies Act, 2013, the offence is compoundable as under section 147(2) it is punishable only with monetary fine.

The Compounding Authority in this case is Regional Director or any officer authorised by the Central Government.

However, if an auditor has contravened provisions of section 144 knowingly or wilfully with the intention to deceive the company or its shareholders or creditors or tax authorities, the offence is not compoundable as in such case the punishment also includes mandatory imprisonment besides monetary fine.

(iii) If a company secretary in practice certifies the annual return otherwise than in conformity with the requirements of section 92 of the Companies Act, 2013, the offence is compoundable as under section 92(6) it is punishable only with monetary fine.

The Compounding Authority in this case is Regional Director or any officer authorised by the Central Government.

(iv) If a company makes any contribution in contravention of the provisions of section 182 of the Companies Act, 2013, the offence is not compoundable as under section 182(4) the punishment includes mandatory imprisonment besides monetary fine.

Answer 4(b)

According to Section 28A of the Securities and Exchange Board of India Act, 1992, if a person fails to pay the penalty imposed under this Act or fails to comply with any direction of the Board for refund of monies or fails to comply with a direction of disgorgement order issued under section 11B or fails to pay any fees due to the Securities and Exchange Board of India, the Recovery Officer may draw up under his signature a statement in the specified form specifying the amount due from the person and shall proceed to recover from such person the amount specified in the certificate by one or more of the following modes, namely:

(a) attachment and sale of the person's movable property;

(b) attachment of the person's bank accounts;

(c) attachment and sale of the person's immovable property;

(d) arrest of the person and his detention in prison;

(e) appointing a receiver for the management of the person's movable and immovable properties,

and for this purpose, the provisions of sections 220 to 227, 228A, 229, 232, the Second and Third Schedules to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962, as in force from time to time, in so far as may be, apply with necessary modifications as if the said provisions and the rules made thereunder were the provisions of this Act and referred to the amount due under this Act instead of to income-tax under the Income-tax Act, 1961.

In view of the above provision, it can be said that SEBI can recover the amount from Amit in the manner as provided under Sec 28A of SEBI Act, 1992.

Answer 4(c)

According to section 7(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974(COFEPOSA), if the appropriate Government has reason to believe that a person in respect of whom a detention order has been made has absconded or is concealing himself so that the order cannot be executed, that Government may:

(a) make a report in writing of the fact to a Metropolitan Magistrate or a Magistrate of the first class having jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of sections 82, 83, 84 and 85 of the Code of Criminal Procedure, 1973, shall apply in respect of the said person and his property as if the order directing that he be detained were a warrant issued by the Magistrate;

(b) by order notified in the Official Gazette direct the said person to appear before such officer, at such place and within such period as may be specified in the order; and if the said person fails to comply with such direction, he shall, unless he proves that it was not possible for him to comply therewith and that he had, within the period specified in the order, informed the officer mentioned in the order of the reason which rendered compliance therewith impossible and of his whereabouts, be punishable with imprisonment for a term which may extend to one year or with fine or with both.

Further, according to section 7(2) of COFEPOSA, notwithstanding anything contained in the Code of Criminal Procedure, 1973, every offence under clause (b) of sub-section (1) shall be cognisable.

In view of the above, necessary action can be taken in accordance with the above mentioned provision.

Answer 4(d)

If a company contravenes the provisions of section 186 of the Companies Act, 2013, every officer of the company who is in default including directors shall be punishable with imprisonment for a term which may extend to two years and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees.

Further, as regards the misappropriation of the funds borrowed by the company, the Directors, by diverting the funds for their personal investments instead of utilising them

for the company's benefits, have violated their fiduciary duties towards the company including those specified under section 166 of the Act and for that violation they shall be liable for penal action under Sec 172 of the Act.

Further, the act of fraudulently diverting the company's funds for their personal investments and then having lost the money, making it unrecoverable, the directors shall also be liable for punishment under Section 447 of the Act. Further, the company may also initiate action against the Directors for criminal misappropriation of the Company's funds under Section 403 and Criminal breach of trust under Section 405 of the Indian Penal Code, 1860.

Alternate Answer 4(d)

In the given case the loan has been taken by the company from its Directors and therefore Section 186 of the Companies Act, 2013*(relating to loans given and investments made by the company)* is not applicable and therefore in the matter of obtaining loans from Directors and relatives, the question of non-compliance of Section 186 by the company does not arises.

Further, with respect to obtaining of the loan from the Directors and relatives by Myriad Ltd, it is relevant to note that, as per Rule 2(1)(c)(viii) of the Companies (Acceptance of Deposits) Rules, 2014, while the loans obtained by the company from its Director shall not considered as a Deposit, a loan taken from the relatives of a Director of a public company is deemed to be Deposits in view of the fact that only in the case of Pvt Ltd company, the loan taken from relatives of a director are to be excluded from the definition of Deposits.

Accordingly, while the loan obtained from the Directors as well as relatives shall both be in compliance of Section 179(3)(d) and Sec 180(1)(c), as regards the part of the loan taken only from the relatives of the Directors, the company shall be additionally liable to ensure compliance of Section 76 of the Act, but only with respect to the loans obtained from the relatives of the Directors, failing which the company shall be liable for penal consequences under Section 76A of the Act.

Further, as regards the misappropriation of the funds borrowed by the company, the Directors, by diverting the funds for their personal investments instead of utilising them for the company's benefits, have violated their fiduciary duties towards the company including those specified under section 166 of the Act and for that violation they shall be liable for penal action under Sec 172 of the Act.

Further, the act of fraudulently diverting the company's funds for their personal investments and then having lost the money, making it unrecoverable, the directors shall also be liable for punishment under Section 447 of the Act. Further, the company may also initiate action against the Directors for criminal misappropriation of the Company's funds under Section 403 and Criminal breach of trust under Section 405 of the Indian Penal Code, 1860.

Question 5

(a) WellBeing Health Group, is a conglomerate which provided various services relating to health, well-being and other medical facilities including specialized hospital care and other medical amenities. Sudaam, a Practising Company Secretary, was approached to provide professional services relating to Company law and other law compliances for the group. He was approached with the following queries :

(i) Hrudaya Private Ltd, was incorporated on September 30, 2020, to provide specialized medical facilities relating to heart related issues.

The following are the details extracted from the audited financial statements of the Company :

₹ Crore

Particulars	*As at March 31, 2021*	*As at March 31, 2022*
Paid up share capital	*5.00*	*14.00*
Reserves & surplus	*2.50*	*6.20*
Turnover	*78.20*	*180.30*
Profit before tax	*8.10*	*18.50*
Profit after tax	*5.90*	*11.60*

The Company has not constituted Corporate Social Responsibility (CSR) Committee, though it has CSR policy in place.

(ii) Vyoma Ltd, is another group company which is a manufacturer of medical and surgical instruments. It is covered under CSR applicability, and has been spending towards ongoing projects covered under its CSR policy, giving preference to its local areas around its factories' locations. However, the Company has not spent any amount towards the ongoing projects due to various reasons during the financial year ended March 31, 2023.

In the background of above facts, prepare a brief note explaining compliance with the requirements for Hrudaya Private Ltd and Vyoma Ltd. Also indicate, if there has been any non-compliance with the provisions of Companies Act, 2013.

(8 marks)

(b) Prekshak Ltd, was a known name in media and news broadcast business. Over last two years, the business was severely impacted, due to heavy competition and the management was evaluating various cost cutting measures to navigate the dwindling profit position. The CFO was given the task, to thoroughly scrutinize all the costs of the Company and identify avenues for cost reduction. After a detailed review, the CFO made a presentation to the Board, indicating various costs including the insurance costs which the Company was bearing. He indicated that the Company was paying huge insurance premiums including premium for director & office insurance (D & O) policy. He suggested the Board members to revisit the requirement for D & O policy and evaluate if the policy can be surrendered. The Board of Directors ask the Company Secretary for his inputs.

Prepare a brief note outlining the requirement for D & O Policy and the principles which the directors are expected to follow in this regard.

(8 marks)

Answer 5(a)

(i) According to section 135(1) of the Companies Act, 2013(the Act), every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during the immediately preceding financial year shall constitute a Corporate Social Responsibility (CSR) Committee of the Board consisting of three or more Directors, out of which at least one director shall be an independent director.

According to section 135(5) of the Act, Board of every company referred to in section 135(1), shall ensure that the company spends, in every financial year, at least two per cent. of the average net profits of the company made during the three immediately preceding financial years or where the company has not completed the period of three financial years since its incorporation, during such immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy.

In the matter of for Hrudaya Pvt Ltd., in the given situation:

(i) the amount to be spent during Financial Year 2021-22 based on the profit for the Financial Year(FY) 2020-21 is 2% of Rs. 8.10 Crore i.e. Rs. 16,20,000/-.

(ii) the amount to be spent during Financial Year 2022-23 based on the profit for the Financial Year(FY) 2021-22 and 2020-21 is 2% of Rs. [(8.10+18.50)/2] Crore i.e. Rs. 26,60,000/-.

According to section 135(9) of the Act, where the amount to be spent by a company under section 135(5) does not exceed fifty lakh rupees, the requirement under section 135(1) for constitution of the Corporate Social Responsibility Committee shall not be applicable and the functions of such Committee provided under section 135 shall, in such cases, be discharged by the Board of Directors of such company.

Since the amount to be spent by Hrudaya Pvt Ltd. in FY 2021-22 as well as 2022-23 under section 135(5) of the Act is less than 50,00,000/-, the requirement under section 135(1) for constitution of the Corporate Social Responsibility Committee shall not be applicable to Hrudaya Pvt Ltd. and the functions of the CSR Committee shall be discharged by the Board of Directors of Hrudaya Pvt Ltd.

Further, if the company fails to spend the prescribed minimum amounts (2%) as referred above within the respective financials years, then the Board shall, in its report made of section 134(3)(o) of the Act, specify the reasons for not spending the amount and the company shall, within a period of 6 months from the end of the relevant FY, transfer the unspent amount of that particular FY into any one of the Fund specified in Schedule VII, pursuant to Sec 135(5).

However, if the unspent amount pertains to an ongoing project, in which case the company shall, transfer the unspent amount within a period of 30 days from the end of the relevant FY to a special account to be opened by the company in that behalf for that FY in any scheduled bank to be called the Unspent Corporate Social Responsibility Account, and such amount shall be spent by the company in pursuance of its obligation towards the Corporate Social Responsibility Policy within a period of three financial years from the date of such transfer, failing which, the company shall transfer the same to a Fund specified in Schedule VII, within a period of thirty days from the date of completion of the third financial year.

According to section 135(7) of the Act, if a company is in default in complying with the provisions of section 135(5) or section 135(6), the company shall be liable to a penalty of twice the amount required to be transferred by the company to the Fund specified in Schedule VII or the Unspent Corporate Social Responsibility Account, as the case may be, or one crore rupees, whichever is less, and every officer of the company who is in default shall be liable to a penalty of one-tenth of the amount required to be transferred by the company to such Fund specified in Schedule VII, or the Unspent Corporate Social Responsibility Account, as the case may be, or two lakh rupees, whichever is less.

In the Matter of Vyom Ltd:

(ii) Proviso to section 135 of the Companies Act, 2013(the Act) provides that if the company fails to spend such amount, the Board shall, in its report made of section 134(3)(o) of the Act, specify the reasons for not spending the amount and, unless the unspent amount relates to any ongoing project referred to in section 135(6), transfer such unspent amount to a Fund specified in Schedule VII of the Act, within a period of six months of the expiry of the financial year.

According to section 135(6) of the Act, any amount remaining unspent under section 135(5), pursuant to any ongoing project, fulfilling such conditions as may be prescribed, undertaken by a company in persuance of its Corporate Social Responsibility Policy, shall be transferred by the company within a period of thirty days from the end of the financial year to a special account to be opened by the company in that behalf for that financial year in any scheduled bank to be called the Unspent Corporate Social Responsibility Account, and such amount shall be spent by the company in pursuance of its obligation towards the Corporate Social Responsibility Policy within a period of three financial years from the date of such transfer, failing which, the company shall transfer the same to a Fund specified in Schedule VII, within a period of thirty days from the date of completion of the third financial year.

Further, in the event of a default in complying with the provisions of section 135(5) or section 135(6), the company shall be liable for penalty under Sec 135(7) as referred above.

In view of the above and on the basis of the given facts, it can be said that there is no non-compliance by Vyoma Ltd. Further, Vyoma Ltd. is required to comply with the provisions of 135(5) and 135(6) of the Companies Act, 2013.

Answer 5(b)

Requirement for D & O Policy

It is essential for every company to have a director & office insurance (D&O), in order to have some peace of mind. If they have not purchased the policy, the top reasons to buy a D&O insurance are provided as under:

1. **Personal assets of directors are at risk:** If a director has been accused of breaching duties, their personal assets are at risk in case they don't have any D&O insurance.
2. **Defending a legal action is an expensive affair:** The legal costs and expenses in litigations involving directors are usually complex and costly.
3. **Investors can file a case against you:** It may sound unlikely, but things can go downward. If investors believe that they have incurred losses due to mismanagement of the company, they could approach the court to seek

compensation. For instance, if any action of a director results in a drop-in share price, which leads to loss to shareholders and investors, then there is a high possibility that they may bring a class-action lawsuit against the company and directors.

4. **Employees can sue directors:** It is not only shareholders who can file a case against the directors as even employees reach the court to challenge the decision of the directors. It is a hard reality that in today's corporate world, there has been a rise in the number of cases filed by employees, related to sexual harassment or wrongful dismissal. For example, in 2016, a sacked software engineer won case against HCL Tech. The court called his dismissal unlawful and asked the company to reinstate the petitioner with continuity of service and paid full salary along with other benefits.

5. **Customers can take legal actions:** In some cases, customers also reach the court against misrepresentations made in the advertisement materials and deceptive trade practices.

6. **Enquiry initiated by regulatory authorities:** Regulatory bodies, like SEBI, Revenue Department, etc.; can initiate enquiry against directors.

7. **In case of bankruptcy or insolvency:** If faced with bankruptcy, creditors can pursue legal action against directors if they think that directors or officers have not acted in their best interest.

8. **Helps in attracting/retaining talent:** Not having a comprehensive D&O may discourage talented employees from joining the company as they know will not be guarded against any legal case if arise in future.

9. **D&O claims are not covered under any other policy:** Most of the people believe that D&O claims are also covered under other liability insurance plans like professional indemnity.

10. **Requirement as per SEBI (LODR) Regulations, 2015:** As per regulation 25(10) of SEBI (LODR) Regulations, 2015, top 1000 listed entities by market capitalization calculated as on March 31 of the preceding financial year, shall undertake 'D and O insurance' for all their independent directors of such quantum and for such risks as may be determined by its board of directors.

Principles which the directors are expected to follow

- **Duty of Care:** It requires directors and officers to act diligently with regard to the management of the company's affairs.
- **Duty of Loyalty:** It restricts directors and officers from using their position in their interest.
- **Duty of Obedience:** It requires directors and officers to ensure that the company is adhering to code of conduct.

Any deviation from the above principles could pose the threat of legal actions against directors.

Question 6

(a) Rasik joined as Company Secretary of Jeetu Jewelers Ltd effective April 1, 2023. Prior to him, Keyur was the Company Secretary of the Company for a period of two years till December 31, 2022. The Registrar of Companies (RoC) sought certain clarifications on the documents filed by the Company for the financial years ended March 31, 2021 and March 31, 2022 by issuing notice dated June 1, 2023 to the Company. The management of the Company asked

Rasik to respond to the Notice appropriately. However, Rasik contended that, as he is in the employment of the Company since April 1, 2023, he would not be in a position to respond to queries relating to earlier periods. Can the Company ask Keyur, to provide the information ?

(4 marks)

(b) *Shareholder activism is strengthened due to recent changes in corporate laws including the Company Act, 2013. These laws empowered the minority shareholders, which in turn, have protected them and empowered them to present their viewpoints to the Board of Directors and more actively protect their interest. Highlight the factors that have played pivotal role in fostering shareholder activism in India.*

(4 marks)

(c) *Roy, proprietor of Roy & Co., approached Fast Rider Private Ltd, a transport carrier to deliver cotton bales from Mumbai to Delhi. The truck driver of the Company misappropriated the goods during transportation and also stated that the bales were lost, during travel and he has no clue how they got misplaced. Roy filed a suit against the Company, citing criminal misappropriation of property. The Company contended that it did not make any gain in this matter and breach of trust is to be considered as a civil wrong and would not constitute a criminal offence. Is the contention of the Company justified ?*

(4 marks)

(d) *On the basis of a complaint lodged with the Police Station, Burra Bazar (Kolkata) an investigation was conducted by the police and the charge-sheet was filed before the Metropolitan Magistrate, Kolkata, against appellants and some other persons for offences under Sections 454, 380 and 120B of the Indian Penal Code, The Magistrate issued process to the accused and after hearing them a charge was framed against them for the said offences. The Metropolitan Magistrate who framed the charge opted to write a short order presumably for dismissing the petition filed by the appellants for discharging them. On appeal against the order, a learned Single Judge of the High Court sets aside the aforesaid order stating that it is clear from the order of(c) Roy, proprietor of Roy & Co., approached Fast Rider Private Ltd, a transport carrier to deliver cotton bales from Mumbai to Delhi. The truck driver of the Company misappropriated the goods during transportation and also stated that the bales were lost, during travel and he has no clue how they got misplaced. Roy filed a suit against the Company, citing criminal misappropriation of property. The Company contended that it did not make any gain in this matter and breach of trust is to be considered as a civil wrong and would not constitute a criminal offence. Is the contention of the Company justified ?*

(4 marks)

Answer 6(a)

According to section 206(2) of the Companies Act, 2013 (the Act) on the receipt of a notice under section 206(1), it shall be the duty of the company and of its officers concerned to furnish such information or explanation to the best of their knowledge and power and to produce the documents to the Registrar within the time specified or extended by the Registrar.

However, where such information or explanation relates to any past period, the officers who had been in the employment of the company for such period, if so called upon by

the Registrar through a notice served on them in writing, shall also furnish such information or explanation to the best of their knowledge.

In view of the above mentioned provision, it can be said that it shall be the duty of Rasik to give explanation/clarification to the best of his knowledge and power.

Further, According to the proviso to section 206(2) of the Act, Registrar of Companies can ask Keyur to provide the information and furnish such explanation/clarification to the best of his knowledge. However, there is no provision which prohibits a company from asking Keyur to provide information and also there is no provision which empowers the Company to ask Keyur to provide the information.

Answer 6(b)

The following factors have played a pivotal role in fostering shareholder activism in India:

1. **Electronic Voting:** With the dawn of electronic age, where the distances around the world have been compressed by the use of internet, the Companies Act, 2013 has acknowledged the need to bring the advantage of technology to voting system of companies in order to enable the shareholders to be active in the decision making of the company. Through e-voting, a shareholder can vote on the resolutions of a meeting without even being present at the general meeting, from a remote location.

   Section 108 of Companies Act 2013 read with Rule 20 of the Companies (Management and Administration) Rules, 2014 empowers Central Government to prescribe the class or classes of companies and the manner in which a member may exercise his right to vote by the electronic means.

   The process of e-voting has given due recognition to the corporate democracy, as it has widened the participation of maximum shareholders in the voting process. Inception of e-voting, has provided an opportunity to the shareholders residing in far-flung areas to participate in the decision-making process of the company.

   They may or may not attend the meeting in person. Boards in their fiduciary capacity are now looked upon for higher accountability and transparency for the effectiveness of their overall governance process. In this direction, e-voting can be said to have engendered corporate democracy.

2. **SEBI Regulations:** Regulation 44 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, provides that the listed entity shall provide the facility of remote e-voting to its shareholders, in respect of all shareholders, resolutions. Further the listed entity shall submit to the stock exchange, within 48 of conclusion of its General Meeting the details regarding the voting results in the prescribed format. The e-Voting platform aims to improve transparency and Corporate Governance standards and also helps in reducing the administrative cost associated with Postal Ballot while facilitating declaration of results immediately after the close of the voting.

3. **Approval of Related Party Transaction by Shareholders:** As per section 188 of the Companies Act, 2013 the consent of the Board of Directors given by a resolution at a meeting of the Board is mandatory for a company to enter into any contract or arrangement with a related party. However, it has been provided that nothing in section 188(1) shall apply to any transactions entered into by the company in its ordinary course of business other than transactions which are not on an arm's length basis. It has also been Provided that no contract or arrangement, in the case of a company having a paid-up share

capital of not less than such amount, or transactions exceeding such sums, as may be prescribed, shall be entered into except with the prior approval of the company by a resolution of Shareholders.

Answer 6(c)

According to section 405 of the Indian Penal Code, 1860, Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

In the given situation, the transport carrier company being the Principal can be held responsible for civil wrong. However, the driver of truck can be held responsible for criminal breach of trust as the following essential ingredients of the offence of Criminal Breach of Trust:

1. The accused must be entrusted with the property or with any dominion over property.
2. There is a dishonest misappropriation uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract.

In view of the given facts and above provision, it can be said that the Liability of the Company can be Civil Liability and the Liability of driver can be Criminal Liability.

Alternate Answer to above paragraph

In view of the fact that the contract for transportation of goods was between Roy & Co. and the Transport carrier company and goods were entrusted to the company and the Driver was an agent of the Transport company and therefore the misappropriation of goods by the Driver leads to (1) breach of trust by the Driver against the Transport company under the employment/ engagement contract between them *inter se*; and (2) a consequent breach of trust by the Transport Company against Roy & Co. under the contract for transportation of goods.

Accordingly, subject to reliance upon the Principal – Agent relationship between the Driver and the Transport company the contention of the Transport company can be challenged if the elements of *mens rea* is proved against the concerned employees or directors of the Company and their Criminal Liability may arise.

Answer 6(d)

The Hon'ble Supreme Court in *Kanti Bhadra Shah v. State of West Bengal*, said that it is unnecessary to write detailed orders, at all stages of the criminal justice such as issuing process, remanding the accused to custody, framing charge etc. The apex Court further held that at the stage of framing charge there need to be only a *prima facie* case and there is no need for giving reasons for his decision to frame charges.

Even in the cases instituted otherwise than on a police report, the Magistrate is required to write an order showing the reasons. Even in a trial before a Sessions Court, the Judge is required to record reasons only if he decides to discharge the accused. But, if he decides to frame charge, he could do so without adducing any reasons.

In view of the above judicial pronouncement, it can be said that detailed written orders may not be required at every stage of trial especially in case of framing of charges.

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